

THE \$500 MILLION QUESTION: ARE THE DEMOCRATIC AND REPUBLICAN GOVERNORS ASSOCIATIONS REALLY STATE PACS UNDER *BUCKLEY'S* MAJOR PURPOSE TEST?

*Ciara Torres-Spelliscy**

INTRODUCTION	486
I. WHAT ARE THE GOVERNORS ASSOCIATIONS AND WHY ARE THEY ESCAPING STATE CAMPAIGN FINANCE LAWS?	492
A. Section 527 Organizations	494
B. What Makes a State PAC a State PAC?	497
C. The DGA's and RGA's Self-Descriptions	500
D. The Giant Role the Governors Associations Play in State Politics	501
E. Magnitude of the Governors Associations as Funders in Gubernatorial Elections	503
F. The Sources of Money for the RGA and the DGA	505
II. WHY CAN'T STATES REGULATE THE DGA AND RGA AS PACs?	513
A. The Federal Major Purpose Test	513
B. How Does the FEC Apply the Major Purpose Test?	515
C. What's the Matter with the Major Purpose Test? ..	517
D. Alternative Approaches to the Major Purpose Test	518

* Assistant Professor of Law, Stetson University College of Law. The author teaches election law and constitutional law. The author would like to thank Professor Fran Hill, Professor Guy-Uriel Charles, Professor Jamin Raskin, Professor Jessica Levinson, and David Gans for commenting on a previous draft of this article; Stetson University College of Law Research Assistants Max Holzbaur and Andrew Graf and Stetson University College of Law Librarian Sally Waters for helping with the research of this piece; Glynn Torres-Spelliscy for his editorial input; and my former colleagues at the Brennan Center for Justice at New York University School of Law for their continued work on the issue of campaign finance.

III. THE CIRCUIT SPLIT: <i>THE MAJOR PURPOSE</i> V. <i>A MAJOR PURPOSE</i>	520
A. The Fourth Circuit's Approach—"The" Major Purpose	521
B. The Tenth Circuit Concurs with the Fourth Circuit	523
C. The Ninth Circuit Allows Regulations of Organizations with "A" Major Purpose	525
IV. HAS ANY STATE REGULATED THE DGA OR RGA AS A PAC?	527
A. North Carolina's Attempt to Regulate the RGA as a PAC	527
B. Vermont's Nascent Success Regulating the RGA as a PAC	529
CONCLUSION	531

INTRODUCTION

Over the past two decades, courts have been keenly cognizant that when it comes to regulating money in politics, size matters. Courts have long excused *de minimis* political spenders from campaign finance regulations.¹ This article tackles the issue of campaign finance regulation from the opposite extreme: namely, whether it is appropriate for courts to excuse mammoth political spenders from campaign finance laws. This article makes the normative argument that enabling the biggest spenders to evade state campaign finance laws is deeply misguided.

Guarding the political sphere from economic influences is a problem as old as the Republic.² As the present 2012 election season dem-

1. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (excusing from an Ohio disclosure regulation a pamphleteer who made her own pamphlets to distribute to her neighbors on a ballot issue); *Sampson v. Buescher*, 625 F.3d 1247, 1254 (10th Cir. 2010) (holding that "the governmental interest in imposing those regulations is minimal, if not non-existent, in light of the small size of the contributions."); *Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (holding disclosure statute unconstitutional as applied to a one-time in-kind *de minimis* expenditure in a ballot measure context and stating "the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 29 (1st Cir. 1993) (striking down a Rhode Island law that required PACs to disclose the identity of every contributor, even when the contribution was as small as \$1, a practice known as "first dollar disclosure").

2. Robert E. Mutch, *Three Centuries of Campaign Finance Law*, in *A USER'S GUIDE TO CAMPAIGN FINANCE REFORM* 1, 11, 23 (Gerald C. Lubenow ed., 2001) (noting that in 1699 the Virginia House of Burgesses passed a law to outlaw the bribery of voters; in 1883 the Pendleton Act barred funding political parties through

onstrates,³ privately financed political campaigns present an ongoing structural threat to the integrity of America's democracy.⁴ The dependency of elected officials on private funds to secure election and reelection may tilt policy in favor of their donors at the expense of the commonwealth.⁵ To guard against this dependency, reformers have long sought to police the impact of concentrated wealth on our democratic mechanisms through statutes imposing, among other restrictions, corporate contribution and expenditure bans in state and federal elections.⁶ This article examines the two largest spenders in American gubernatorial elections, the Democratic Governors Association (DGA) and the Republican Governors Association (RGA) (collectively, Governors Associations), investigating the problems that surround political spenders who appear to be too big to regulate.

In 2010, a narrow majority of the Supreme Court in *Citizens United v. FEC*⁷ granted corporations the right to buy an unlimited supply of election advertisements—a practice that had been federally outlawed on anti-corruption grounds since 1947⁸—and outlawed in

assessments of certain government workers; and in 1907 Congress banned corporate contributions to federal candidates).

3. Dan Eggen, *Super PACs Dominating Republican Presidential Race*, WASH. POST (Feb. 20, 2012), http://www.washingtonpost.com/politics/super-pacs-dominating-republican-presidential-race/2012/02/20/gIqANOaGQR_story.html; Richard L. Hasen, *The Numbers Don't Lie: If You Aren't Sure Citizens United Gave Rise to the Super Pacs, Just Follow the Money*, SLATE (Mar. 9, 2012, 2:56 PM), http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html; Brody Mullins & Alicia Mundy, *Super PACs Outspent Candidates in Run-Up to Tuesday*, WALL ST. J. (Mar. 7, 2012, 7:55 PM), <http://online.wsj.com/article/SB10001424052970203961204577267822228233682.html>.

4. See generally Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1162 (1994) ("In an economic regime founded on the market principle, money is king; absent legal restraint, it can buy anything, including the favor of politicians, legislation, and public policy Laws against bribery . . . are woefully inadequate to the task Bribery laws leave in place the deep structural bias that makes government habitually more responsive to the interests of organized moneyed elites than to the interests of all others.").

5. See Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 106–07 (2009) ("[B]ecause these public officials depend upon private wealth to secure their tenure, they will become responsive to the concerns of that private wealth, so as to assure its continued supply.").

6. See Adam Winkler, "Other People's Money:" Corporations, Agency Costs, and Campaign Finance Law, 92 GEORGETOWN L. J. 871 (2004).

7. 130 S. Ct. 876 (2010).

8. Labor-Management Relations Act, Pub. L. No. 80–101, 61 Stat. 159, 159–60 (1947); see also ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 153–157 (1988) (arguing that Republicans in the 80th Congress passed Taft-Hartley to punish organized labor. Truman vetoed

several states since the turn of the twentieth century.⁹ Thus, *Citizens United* eliminated corporate expenditure bans.¹⁰ Much ink has been spilled lamenting this turn of events.¹¹ While *Citizens United* fittingly captured the nation's attention as a deregulation of corporate campaign spending restrictions,¹² the case did not actually do away with all such regulations.¹³ Bans on direct corporate contributions to candi-

the bill but the Republicans joined forces with the Southern Democrats to override the veto.).

9. In 1891, Kentucky prohibited corporate campaign spending in its Constitution. *See* Ky. Const. § 150. By 1897, Nebraska and Tennessee had enacted statutes to ban corporate campaigning. *See* Act of Apr. 3, 1897, ch. 19, 1897 Neb. Election Laws 42; *see also* Acts of Apr. 29, 1897, ch. 18, 1897 Tenn. Pub. & Priv. Acts 143.

10. *Citizens United*, 130 S. Ct. at 876. *But see* *W. Tradition P'ship, Inc. v. Attorney General*, No. DA 11-0081 (Mont. 2011) (upholding Montana's corporate expenditure ban after applying strict scrutiny).

11. *See generally* Reza Dibadj, *Citizens United as Corporate Law Narrative*, 16 NEXUS: CHAP. J. L. & POL'Y 39, 56 (2011) ("*Citizens United* must be recognized as part of a very sophisticated attempt at putting forth a deregulatory agenda through constitutional rhetoric."); Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 18 (2010) ("[T]he intellectual and legal apparatus that created the commercial speech doctrine and led to *Citizens United* may prop up the laissez-faire approach to regulation even as its shortcomings become manifest."); Eliza Newlin Carney, *The Deregulated Campaign*, CQ WEEKLY, Sept. 17, 2011, available at <http://public.cq.com/docs/weeklyreport/weeklyreport-000003940582.html> ("All but a few of the restrictions that for decades had curbed political money are gone."); Richard L. Hasen, *What the Court Did—and Why*, THE AM. INT., July/Aug. 2010, at 49 ("[I]t has become apparent that corporations and trade associations, such as the Chamber of Commerce, now feel as though a cloud has been lifted on their election-related activities."); Frances R. Hill, *Implications of Citizens United for the 2010 Election and Beyond*, A.L.I.-A.B.A. CONTINUING LEGAL EDUC., 103, 105 (Oct. 21–22, 2010), available at http://files.ali-aba.org/thumbs/datas-torage/skoobesruoc/pdf/CS019_chapter_05_thumb.pdf ("*Citizens United* is the foundational precedent in what is highly likely to be a series of Supreme Court decisions that deregulate campaign finance."); Peter Overby, *A Year Later*, *Citizens United Reshapes Politics*, NPR (Jan. 31, 2011, 2:00 PM), <http://www.npr.org/2011/01/21/133083209/a-year-later-citizens-united-reshapes-politics> ("This is how things go in the post-*Citizens United* world of political money: deadlocks, protests and a steady push toward deregulation.").

12. Even sitting Supreme Court Justices have been concerned about the impact of *Citizens United*. *See* *Am. Tradition P'ship, Inc. v. Bullock*, No. 11A762 (statement of Ginsburg, J. & Breyer, J.), available at <http://big.assets.huffingtonpost.com/11A762.pdf> ("*Montana's* experience, and experience elsewhere since this Court's decision in *Citizens United* . . . make it exceedingly difficult to maintain that independent expenditures by corporations 'do not give rise to corruption or the appearance of corruption.' A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway . . .") (internal citations omitted).

13. *See* Jeremy G. Mallory, *Still Other People's Money: Reconciling Citizens United with Abood and Beck*, 47 CAL. W. L. REV. 1, 34 (2010) ("[H]iding in plain sight, is the fact that the Tillman Act has not yet been struck down: corporations cannot make campaign contributions directly to [federal] candidates.").

dates and to political parties at the federal level and in twenty-one states are still standing as of February 2012.¹⁴ Less consideration has been given to these remaining state corporate contribution bans. The goal of this article is to begin to fill that gap in the literature.

This article offers a case study of the Governors Associations because they have played a central financial role in recent state elections. Between October 4, 2002 and December 31, 2010—the period that this article will cover—the Governors Associations participated in gubernatorial elections in forty-eight of the fifty states,¹⁵ and spent nearly half a billion dollars.¹⁶ But they have largely escaped regulation by state election officials in the very states where they lavish money on electing governors. Importantly, the strategies used by the Governors Associations to evade campaign finance regulations are not unique to these two groups; any multi-state group could potentially evade these state anti-corruption laws in the same way.

The Governors Associations are everywhere, but are regulated almost nowhere. What little regulation falls on them is imposed not by the fifty states, but by the IRS, which requires the Governors Associations to report their income and spending.¹⁷ This IRS reporting reveals that much of the money filling the coffers of the Governors Associa-

14. *Life After Citizens United*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2011), <http://www.ncsl.org/default.aspx?tabid=19607>. Tennessee and New Hampshire changed its law post-*Citizens United* to allow even corporate contributions in these states. Therefore, throughout most of the time period examined here (2002–2010), there were twenty-three states that had corporate bans on the books; now there are twenty-one.

15. Only Kentucky and Massachusetts were spared Governors Associations' spending. See *Noteworthy Contributor Summary, Republican Governors Association*, NAT'L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/topcontributor.phtml?u=4969&y=0&incs=0&ince=0&incf=0&incy=0&so8=C#sorttable8> (last visited Jan. 28, 2012); *Noteworthy Contributor Summary, Democratic Governors Association*, NAT'L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/topcontributor.phtml?u=781&y=0> (last visited Jan. 28, 2012). In Alaska, the RGA spent independently. *Alaska 2010 Independent Spending, Republican Governors Association*, NAT'L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/StateGlance/iespender.phtml?ie=4639> (last visited Jan. 28, 2012).

16. See *infra* Tables 1–2.

17. See ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RES. SERV., 527 GROUPS AND CAMPAIGN ACTIVITY: ANALYSIS UNDER CAMPAIGN FINANCE AND TAX LAWS 2 (2008), available at <http://www.congressionalresearch.com/RS22895/document.php?study=527+Groups+and+Campaign+Activity+Analysis+Under+Campaign+Finance+and+Tax+Laws> (“Congress amended IRC § 527 in 2000 and 2002 to generally require that most § 527 political organizations report information to the IRS. . . . Section 527 political organizations that are not FEC-regulated political committees are generally required to report to the IRS . . . and periodically disclose information on contributors who have given at least \$200 during the year and expenditures made to persons who have received at least \$500 during the year . . .”).

tions is actually corporate in origin. A majority of the corporate contributions (over 65%) comes from publicly traded corporations, which raises corporate governance issues as well as democratic concerns.¹⁸

As this article will explore, because of how certain lower courts have interpreted *Buckley*'s "major purpose" test, the Governors Associations typically fall outside of the definition of state political action committees (or state PACs),¹⁹ and thereby avoid the regulations that apply to such organizations. This article will argue that *Buckley*'s major purpose language should be construed more broadly so that a multistate group, like the RGA or DGA may not escape regulation just because it never spends a majority of its resources in any single state.²⁰

Some of the courts that have considered this question of the proper application of *Buckley*'s test may be using the wrong denominator to define each Governors Association's major purpose, basing their calculations on a national four-year budget. Examining in-state spending in relation to a Governors Association's national four-year budget appears to be a misleading comparison. That formulation would make any particular in-state spending seem miniscule, since the size of each Governors Association's four-year budget is likely to be enormous. Thus, comparing spending in one state with the group's total national budget does not appear to be a sound approach.²¹ A better inquiry might be to consider what budget the RGA or DGA designated for a given state, and then look into what percentage of that internal state budget was actually spent electing candidates for that state. Or alternatively, if the RGA and DGA spend in nearly all states simultaneously, the more relevant inquiry would be what percentage

18. CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUST., CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 7-15 (2010) [hereinafter TORRES-SPELLISCY, CORPORATE CAMPAIGN SPENDING]; Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the US Should Adopt the British Approach*, in RISK MANAGEMENT AND CORPORATE GOVERNANCE (Routledge 2011) [hereinafter Ciara Torres-Spelliscy, *Corporate Political Spending*].

19. In this article, state PACs, state Political Action Committees and State Political Committees are all synonymous.

20. See *N.C. Right to Life, Inc. v. Leake* (NCRTL III), 525 F.3d 274, 288-89 (4th Cir. 2008); *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1152-55 (10th Cir. 2007).

21. The problem highlighted here could present a horizontal federalism issue. It is possible that just as states need to coordinate in order to regulate multi-state businesses when collecting taxes, perhaps multi-state cooperation would address this unregulated money as well. Of course, this is difficult because, unlike taxation where every state agrees that they want their share of tax revenues, the states have not agreed on a uniform approach to campaign finance. Virginia and Oregon, for example, have no restrictions, while states like Montana and Minnesota have stringent restrictions.

of their fifty state budgets compared with their total budget has been spent to elect state candidates.

Because courts have compared in-state spending to the national budget, the RGA and DGA have been able to pull the same gambit in state after state, arguing that their major purpose is not the election of candidates in *that particular state*, and therefore they cannot be regulated as state PACs. The Governors Associations' ability to evade state campaign finance laws raises deeper questions about our constitutional structure of federalism; namely, whether it is appropriate for states to be powerless to regulate a multi-purpose entity that has a significant impact on state elections, and whether courts should excuse these groups from complying with duly enacted state laws.²²

This weak state regulation seems to produce an absurd result considering the outsized role that the Governors Associations can play in a state's election—each often ranks as one of the biggest spenders, if not the biggest.²³ A broader, more sensible reading of *Buckley* would allow states to regulate major players in their gubernatorial elections, thereby allowing states to comply with the anti-corruption principle that animates the American Constitutional structure.²⁴ However, if courts continue to embrace a narrow vision of *Buckley*'s major purpose language—thereby enabling the largest groups to spend corporate money in elections in contravention of state laws—then reform should focus on staunching the flow of corporate money at the source: within the corporate structure itself. This would require empowering private actors—in this case, shareholders—to police this spending when public actors (e.g., election administrators) have been impeded.²⁵ Since I have previously written at great length about the compelled speech problems for investors presented by corporate political

22. Perhaps the courts' role in allowing the Governors Associations to skirt state laws is symptomatic of a deeper problem identified by Professor Roberto Unger as a "dirty little secret" of contemporary jurisprudence: its "discomfort with democracy." As he explained, "The discomfort with democracy shows up in every area of contemporary legal culture: in the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities . . . [and] the opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement, as threat to a regime of rights . . ." ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 72–73 (1996).

23. Gary Wong, *Corporate Donors Dole Out Hefty Sums to Democratic, GOP Governors Associations*, OPENSECRETSBLOG (Apr. 29, 2011, 3:55 PM), <http://www.opensecrets.org/news/2011/04/corporate-donors-dole-out-hefty-sums.html>.

24. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009) ("[T]he framers of the Constitution saw the document as a structure to fight corruption.").

25. Lucian A. Bebchuk & Robert L. Jackson, *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 96–97 (2010); Lucian Bebchuk, *Corporate Political*

spending, I will omit a further discussion of shareholder-based solutions from this piece.²⁶

In Part I of this article, I will discuss details about the Governors Associations, including their Section 527 tax status and their self-descriptions. I will also explore the overlapping donors who fund the Governors Associations, with a particular focus on their corporate donors. In addition, I will demonstrate the large role that the Governors Associations have played in state elections from 2002–2010. In Part II, I will explore why states have immense difficulty in regulating multistate political groups such as the Governors Associations. In Part III, I will discuss the circuit split over *Buckley*'s major purpose test. Finally, in Part IV, I will assess the experience of two states that have attempted to regulate the RGA as a Political Action Committee (PAC).²⁷

I.

WHAT ARE THE GOVERNORS ASSOCIATIONS AND WHY ARE THEY ESCAPING STATE CAMPAIGN FINANCE LAWS?

Although the federal ban on corporate contributions to candidates also remains intact post-*Citizens United*, I will focus here on corporate contribution bans in state elections. Gubernatorial elections are a geographical hybrid in which state voters mix with out-of-state political spending.²⁸ Non-residents may not vote for gubernatorial candidates.²⁹ But because of the mobility of capital, the money spent in statewide elections to fund candidate campaigns, fill state party coffers, and influence voters through political advertisements could all

Speech is Bad for Shareholders, PROJECT SYNDICATE (Feb. 23, 2010), <http://www.project-syndicate.org/commentary/bebchuk10/English>.

26. TORRES-SPELLISCY, CORPORATE CAMPAIGN SPENDING, *supra* note 18, at 13–14; Torres-Spelliscy, *Corporate Political Spending*, *supra* note 18, at 397–99; Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U.S.F. L. REV. 479, 481–88 (2012); Ciara Torres-Spelliscy, Comment Submitted to the Securities and Exchange Commission Endorsing a New Rule on Transparency of Corporate Political Spending, Nov. 2, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1955950.

27. See *infra* Tables 3–4.

28. *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (“Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.”).

29. See Alfred R. Light, *Bush v. Gore—Georgia Lived it Before: Pickrick and the Warren Court*, 18 GA. ST. U. L. REV. 449 (2001) (“[O]nce the entire state is designated as the area to be represented by the Governor, for example, and once every qualified voter casts a ballot, then each voter must have equal voting power.”).

originate out-of-state.³⁰ Courts have, on balance, been hostile to states' attempts to limit out-of-state money in state elections.³¹ Thus, a corrupting influence may come not only from a local source, but also from an external group with little fealty or connection to local voters.³² Because out-of-state money may prove just as corrupting as in-state money, a state government should have the power to regulate both sources in a congruent manner. Traditionally, states have relied on campaign finance laws (a subset of election laws) to dictate which entities can or cannot spend in state elections and what amounts they may spend.³³ More than twenty states still have statutory bans on cor-

30. Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. REV. 35, 45 (2010) (“[P]eople who reside outside of the state can have a major impact on in-state politics. It has been reported that during the 2006 referendum approximately \$5.9 million was spent The campaign disclosure forms indicate that an overwhelming amount of that originated out-of-state.”); Laura Coleman, *Communication: The Key to Consensus, Some Say Today's Political Culture Adds to Contention*, COUNCIL OF STATE GOV'TS STATE NEWS Sept. 2006, at 10, 11, available at <http://www.csg.org/knowledgecenter/docs/SN0609.pdf> (“[C]ampaigns became increasingly costly and a lot of money comes in from out of state. It influences what people say about each other.”) (quoting Chris Carlson).

31. *Landell v. Sorrell*, 382 F.3d 91, 146 (2d Cir. 2004) (Vermont's twenty-five percent “out-of-state contribution limit isolates one group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed by others (Vermont residents).”); *VanNatta v. Keisling*, 151 F.3d 1215, 1217-18 (9th Cir. 1998), cert. denied sub nom., *Miller v. VanNatta*, 525 U.S. 1104 (1999) (invalidating an Oregon law that limited the use of non-resident contributions to ten percent of total campaign expenditures). *But see State v. Alaska Civil Liberties Union*, 978 P.2d 597, 617 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000) (upholding Alaska's out-of-state limit because “[w]ithout restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly disproportionate to the support nonresidents' views have among the Alaska electorate, Alaska's contributors, and those most intimately affected by the elections, Alaska residents”); *W. Tradition P'ship, Inc. v. Attorney Gen.*, 363 Mont. 220 (Mont. 2011) (upholding Montana's corporate expenditure ban in part because it addressed corruption caused by out of state corporate spending in Montana).

32. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 227 (1999) (Rehnquist, C.J., dissenting) (“[I]n recent years, the initiative and referendum process has come to be more and more influenced by out of state interests which employ professional firms doing a nationwide business.”) (citations omitted). Out-of-state money also has an impact on Congressional races. ERIC ALTERMAN, *KABUKI DEMOCRACY: THE SYSTEM VS. BARACK OBAMA* 123 (2011) (“In Democrat John Kerry's 2008 Massachusetts Senate race, for example, two thirds of both candidates' contributions were from out-of-state. Consider the absurdity: Wealthy donors who cannot legally vote on the outcome of a local representative election because the winner will not represent them can wield far more influence at the ATM than at the ballot box.”).

33. BRENNAN CTR. FOR JUSTICE, *WRITING REFORM A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS*, 2010 REVISED ED., at III-1-III-41 (Ciara Torres-Spelliscy, ed.) [hereinafter *WRITING REFORM*], available at http://www.brennancenter.org/content/resource/writing_reform_2010/.

porations' contributing to candidates for office or political parties. However, as evidenced by the electoral spending by the corporate-backed DGA and RGA, these bans are not keeping corporate money out of state elections.

A. *Section 527 Organizations*

The ability of states to regulate the Governors Associations under campaign finance laws depends largely on whether they are defined as state PACs or not. As a tax matter, the DGA and RGA are registered as "political organizations" with the IRS under section 527 of the Internal Revenue Code (IRC). A 527 organization (527) is a "party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function."³⁴ An exempt function is defined as a "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors"³⁵ As 527s, the RGA and DGA may be subject to certain taxes in limited circumstances.³⁶ For instance, donations to 527s are not tax-deductible for donors.³⁷ On the other hand, donations to these groups also do not trigger the gift tax for donors.³⁸

34. 26 U.S.C. § 527(e)(1) (2000).

35. *Id.* § 527(e)(2).

36. Under the tax code, 527s must either disclose their contributors and expenditures or be subject to a thirty-five percent tax. 26 U.S.C. §§ 527(i)(1), (j)(1), (j)(3). Because they have disclosed their donors, they are not subject to this tax. However, 527s are subject to taxes on their investment income. *See Taxable Income—Political Organizations*, IRS, <http://www.irs.gov/charities/political/article/0,,id=96351,00.html> (last updated July 20, 2011) (noting "investment income, or income from a trade or business (such as renting excess office space to an unrelated organization), of a political organization is not exempt function income and is subject to tax.").

37. 26 U.S.C. § 527.

38. Internal Revenue Code section 2501(a)(5) exempts contributions to 527s from the gift tax. The gift tax is payable by the donor at a thirty-five percent rate over the annual exclusion of \$13,000.

Unlike their secretive 501(c) cousins,³⁹ 527s are subject to public disclosure requirements.⁴⁰ This transparency is a relatively recent development, resulting from the 2000 amendments to the IRC.⁴¹ Before 2000, 527s often used legal loopholes in order to conceal their donors. As Professor Richard Briffault explains:

In the late 1990s, politically active interest groups flourished in the regulatory gap between the Internal Revenue Code and [Federal Election Campaign Act (FECA)]. These organizations were able to argue successfully both that their issue advocacy and other electoral activities were sufficiently election-related to qualify for section 527 tax-exempt treatment, but not sufficiently election-related to trigger FECA's disclosure requirements and other rules. These politically active organizations could enjoy tax-exempt status, sidestep FECA's limitations and requirements, avoid section 501(c)'s primary purpose cap on campaign activities, and benefit from the gift tax exemption for donations to 527 organizations, to boot.⁴²

Congress closed this disclosure loophole by amending section 527.⁴³ Now, the IRC requires basic reporting of money flowing in and out of 527s. As Professor Briffault succinctly summarizes: “[T]he 527 organization must periodically report the names and addresses of contributors of \$200 or more per year, and the amounts they have donated; it must also periodically report the amounts, dates, and purposes of expenditures of \$500 or more per year.”⁴⁴

39. For example, 501(c)(4)s and (6)s may participate in partisan politics but they are not required to share the source of their funds with the public. L. PAIGE WHITAKER ET AL., CONG. RESEARCH SERV., R 41096, LEGISLATIVE OPTIONS AFTER *Citizens United v. FEC*: Constitutional and Legal Issues 6 n.41 (2010) (“Under the Internal Revenue Code, § 501(c) organizations that file an annual information return (Form 990) are generally required to disclose significant donors (typically those who give at least \$5000 during the year) to the Internal Revenue Service (IRS). 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). No identifying information of donors to § 501(c) organizations is subject to public disclosure under the tax laws except in the case of private foundations (which are a type of § 501(c)(3) organization).”).

40. Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363 (2011); Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J. OF L. & PUB. POL’Y 59, 60 (2011).

41. Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, 625–26 n. 71 (2003).

42. Richard Briffault, *The 527 Problem . . . And the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 959 (2005).

43. *Id.*

44. *Id.*

Detailed reports for each 527 are publicly available on the IRS's webpage.⁴⁵ These reports from 2002 to 2010, as aggregated by the Center for Responsive Politics' Open Data Initiative, served as one of my primary data sources for facts about the day-to-day operations of the RGA and DGA. Other data I relied upon, which tracked the DGA and RGA from 2000 to 2006, was compiled by the Center for Public Integrity.⁴⁶ Finally, I used data from the National Institute on Money in State Politics, which aggregates campaign finance data for the fifty states.⁴⁷

The transparency supplied by the IRS's 527 reporting does have some limits. For example, the 2010 post-election disclosure report from the RGA lists a \$39,125 expenditure at the Ritz-Carlton New York, Central Park on October 27, 2010, but the report does not indicate which campaign (if any) this expenditure supported.⁴⁸ This lack of specificity concerning why the money was spent is perfectly fine under the IRS's regulations, which only require 527s such as the RGA to list the general purpose of the expenditure, which the RGA listed on its report as "AMEX/TRAVEL." Similarly, the DGA's 2008 post-election report includes an expenditure of \$41,342 to FPH Consulting, and lists the purpose as "TravelLodging," providing no specificity about the political campaign supported (if any).⁴⁹ Because there is no requirement to list the political campaign associated with a particular expenditure in the Governors Associations' IRS forms, it is impossible for an outsider, including a state regulator, to discern whether the expenditure was made in compliance with campaign finance laws across the fifty states.

45. *Political Organization Filing and Disclosure*, INTERNAL REVENUE SERV., <http://www.irs.gov/charities/political/article/0,,id=109644,00.html>. (last visited Dec. 11, 2011).

46. The Center for Public Integrity recently changed its webpage removing this data. A copy of the original 2002–2006 data from the Center for Public Integrity is on file with the author.

47. *About the Institute*, NAT'L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/Institute/index.phtml> (last visited Feb. 2, 2012); *Our Mission: Inform, Empower & Advocate*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/about/index.php> (last visited Feb. 2, 2012).

48. Republican Governors Association's IRS Form 8872 (for the period beginning 10/01/2010 and ending 11/22/2010), IRS, <http://forms.irs.gov/politicalOrgsSearch> (follow the "Search Political Organization Disclosures" hyperlink; select "Form 8872"; then search "Organization Name" for "Republican Governors Association" and search "Date Form Posted" for "10/01/2010" and "11/22/2010.").

49. Democratic Governors Association's IRS Form 8872 (for the period beginning 10/16/2008 and ending 11/24/2008), IRS, <http://forms.irs.gov/politicalOrgsSearch> (follow the "Search Political Organization Disclosures" hyperlink; select "Form 8872"; then search "Organization Name" for "Democratic Governors Association" and search "Date Form Posted" for "10/16/2008" and "11/24/2008.").

B. What Makes a State PAC a State PAC?

Whether the Governors Associations are state PACs has a complicated answer under current campaign finance jurisprudence, depending in part on local courts' judicial gloss on *Buckley*'s major purpose language. A simple rule of thumb is that after *Buckley*, all PACs are 527s, but not all 527s are PACs.⁵⁰ Whether or not a 527 is a state PAC is a question of state statute. As the Federal Election Commission (FEC) Program Director at the Campaign Legal Center, Paul S. Ryan, rightly reminds us, “[s]ignificant variation exists among state law definitions of ‘political committee.’”⁵¹

Under many state laws, a PAC is defined as two or more persons working in concert to elect or defeat a candidate for public office. For example, in Delaware, a political committee is defined as “any organization or association, whether permanent or created for the purposes of a specific political campaign, which accepts contributions or makes expenditures for or against any candidate or candidates, and includes all political parties, political action committees and any candidate committee.”⁵² And in Idaho, a political committee is defined as “[a]ny person who receives contributions and makes expenditures in an amount exceeding five hundred dollars (\$500) in any calendar year for the purpose of supporting or opposing one (1) or more candidates or measures. Any entity registered with the Federal Election Commission shall not be considered a political committee for purposes of this chapter.”⁵³ Thus, the legal definition of a state PAC is not the same across the fifty states (nor do state definitions match federal definitions). As will be explained in more detail below, all state PAC definitions are subject to the same “major purpose test” requirement found in *Buckley*. However, there is a circuit split concerning the application of this test.⁵⁴

Whether politically active groups must register as state PACs is important because PACs have strict entity-wide disclosure obligations that require transparency for every dollar they take in and spend. In

50. Edward Foley, *Comments to the FEC: April 5, 2004*, 31 N. KY. L. REV. 361, 371 (2004) (“[A] 527 group can have influencing the *appointment* of individuals to *non-electoral* offices as its major purpose. Thus, the fact that a group qualifies as a 527 does not make it necessarily, or even presumptively, a political committee under FECA.”).

51. Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471, 485 (2008).

52. DEL. CODE ANN. tit. 15 § 8002(13) (West 2012).

53. IDAHO CODE ANN. § 67-6602(p)(2) (West 2012).

54. Compare *NCRTL III*, 525 F.3d at 288–89 and *Colo. Right to Life Comm.*, 498 F.3d at 1152–55 with *Brumsickle*, 624 F.3d 990, 1010–1011 (9th Cir. 2010).

most states, PACs are the primary mechanism for educating voters about who exactly is spending money in politics.⁵⁵ Moreover, in many states independent expenditures⁵⁶ are under-reported or not reported at all.⁵⁷ In states with poor independent expenditure reporting, the only electoral funding information available to the public is the money in PACs.⁵⁸ Therefore, if political spenders can avoid being designated as PACs in these poor disclosure states, they can potentially mask their role in state elections entirely.⁵⁹ Disclosure of the sources of campaign finance is constitutional under an unbroken line of cases spanning from *Buckley* in 1976 to *Doe v. Reed* in 2010.⁶⁰

PAC status is also important because in roughly half of the states, PACs are subject to contribution limits.⁶¹ The constitutional justifications for subjecting PACs to contribution limits are the state's interests in preventing political corruption and preventing the circumvention of individual contribution limits.⁶²

55. 2010 *Best Practices*, NAT'L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/content/bestpractices/index.phtml> (last visited Mar. 4, 2012).

56. "Independent expenditures" are expenditures spent in an election to support or oppose a candidate that are done independently of a candidate. They are subject to different reporting requirements from PACs. For a more in-depth discussion of this, see CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, *TRANSPARENT ELECTIONS AFTER Citizens United* (2011), available at http://www.brennancenter.org/content/resource/transparent_elections_after_citizens_united/.

57. LINDA KING, NAT'L INST. ON MONEY IN STATE POL., *INDECENT DISCLOSURE PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4* (2007), <https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1>.

58. TORRES-SPELLISCY, *TRANSPARENT ELECTIONS AFTER CITIZENS UNITED*, *supra* note 56, at 13.

59. See Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, *supra* note 40, at 84–90.

60. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (disclosure serves three distinct state interests: It (1) "provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office;" (2) "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) "[is] an essential means of gathering the data necessary to detect violations of the contribution limitations."); *McConnell v. FEC*, 540 U.S. 93, 196–97 (2003) (accord); *Doe v. Reed*, 130 S. Ct. 2811, 2819–20 (2010) (electoral integrity interest in ballot initiative process); *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (accord voter informational interest).

61. NAT'L CONF. OF STATE LEGISLATURES, *LIMITATIONS ON CONTRIBUTIONS TO POLITICAL COMMITTEES* (2005), available at http://www.ncsl.org/Portals/1/documents/legismgt/limits_PACs.pdf.

62. See, e.g., *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197–99 (1981) (recognizing that Congress limited contributions to PACs "in part to prevent circumvention of the . . . limitations on contributions [to candidates]" and that "this provision is an

The third reason PAC status is important is because PACs can be subject to source restrictions. PACs in twenty-one states are subject to source restrictions, such as barring corporate and/or union contributions. For example, in Iowa, it is unlawful for a “corporation . . . to contribute any money, property, labor, or thing of value, directly or indirectly, to a [political] committee”⁶³ Twenty-one states have restrictions on direct corporate contributions to state candidate committees.⁶⁴ These source restrictions are constitutional under the 2003 Supreme Court case *Beaumont*,⁶⁵ which remains good law, despite one lower court case to the contrary.⁶⁶ *Beaumont* stands for the proposition that corporate contributions to candidates raise the risk of political corruption.⁶⁷ As the Supreme Court wrote: “In sum, our cases on campaign finance regulation represent respect for the ‘legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.’”⁶⁸

appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*”); *Buckley*, 424 U.S. at 38. Lower courts have also recognized the anti-evasion rationale in a variety of contexts. See *Ky. Right to Life v. Terry*, 108 F.3d 637, 649 (6th Cir. 1997) (acknowledging a “legislative determination that aggregate limitations are necessary to prevent manipulation of permanent committees in order to evade the Act’s \$1,000 limitation on direct contributions to any one political candidate”); *Vote Choice v. DiStefano*, 4 F.3d 26, 35 (1st Cir. 1993) (recognizing “the state’s interest in enforcing its contribution limits”).

63. Iowa C. § 68A.503.

64. *Life After Citizens United*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 4, 2011), <http://www.ncsl.org/default.aspx?tabid=19607>; STATE OF MAINE COMM’N ON GOVERNMENTAL ETHICS AND ELECTION PRAC., STATE LIMITS ON CONTRIBUTIONS TO PACs (2007), available at http://www.lwvme.org/files/State_Limits_on_Contributions_to_PACs.pdf.

65. *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (“[T]he [corporate contribution] ban has always done further duty in protecting ‘the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.’”) (internal citations omitted); *id.* at 163 (“The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure”).

66. *United States v. Danielczyk*, 791 F. Supp. 2d 513 (E.D. Va. 2011), *appeal filed*, No. 11-4667 (4th Cir. June 16, 2011) (holding the federal Tillman Act’s ban on corporate donations unconstitutional as applied to a specific corporation).

67. *Beaumont*, 539 U.S. at 154 (“In barring corporate earnings from conversion into political ‘war chests,’ the ban was and is intended to ‘prevent[t] corruption or the appearance of corruption.’”) (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–497 (1985)).

68. *Id.* at 155; see also *United States v. Int’l Union United Auto., Aircraft & Agric. Implement Workers*, 352 U.S. 567, 576 (1957) (“We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal

Accordingly, being deemed a PAC by an election regulator often confers three additional duties that non-PACs lack: (1) the duty to disclose contributions and expenditures; (2) the duty to abide by contribution limits; and/or (3) the duty to abide by source restrictions.⁶⁹ All of these PAC duties are motivated by anti-corruption concerns, which is why courts, including the U.S. Supreme Court, have upheld them as constitutional exercises of state power.

C. *The DGA's and RGA's Self-Descriptions*

Does the 527 status of the Governors Associations mean that they are electoral groups—the constitutionally necessary hook enabling states to regulate them as PACs? Both groups' self-descriptions certainly indicate their electoral focus. The DGA describes itself on its website in the following way:

The Democratic Governors Association (DGA) is an independent voluntary political organization organized to support Democratic governors and candidates across the nation. As the only organization dedicated to electing Democratic governors and candidates, the DGA participates at all levels of campaigns, from providing resources to fund operations to helping articulate and deliver their messages.⁷⁰

Meanwhile, the RGA describes itself on its webpage as follows:

The Republican Governors Association's primary mission is to help elect Republicans to governorships throughout the nation, but we are also dedicated to providing our governors with the resources to help them govern effectively. The RGA is the most innovative and disciplined political committee in the country. Our political team has experience running state parties and winning gubernatorial campaigns. . . . The RGA runs political campaigns that go far beyond simply running negative TV ads in the last few weeks before the election. We reach voters everywhere they get their news, from TV and radio to direct mail and the internet.⁷¹

campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.") (Frankfurter, J. (quoting 65 Cong. Rec. 9507–08 (1924)).

69. In addition to these three duties, federal corporate PACs are statutorily restricted from soliciting funds from the general public. 2 U.S.C.A. § 441b(a).

70. *About*, DEMOCRATIC GOVERNORS ASS'N, <http://www.democraticgovernors.org/about/> (last visited Mar. 4, 2012).

71. *About*, REPUBLICAN GOVERNORS ASS'N, <http://www.rga.org/homepage/about/> (last visited Mar. 4, 2012).

Both the DGA's and RGA's descriptions make clear that they are political organizations with an explicitly electoral purpose: to elect as many candidates to the nation's fifty governorships from their respective side of the aisle as possible. Despite their self-professed electoral purpose, the RGA and DGA are not generally regulated as PACs under state laws. As will be described in further detail below, North Carolina tried to regulate the RGA as a PAC and failed. As this article was being written, Vermont chalked up a victory in a lower court against the RGA, winning the right to regulate it as a PAC.⁷²

D. The Giant Role the Governors Associations Play in State Politics

The RGA and DGA typically avoid regulation as state PACs by not spending a majority of their respective funds in any one state. If the Governors Associations were *de minimis* political players, their escaping regulation might not matter terribly. But these two groups are a far cry from *McIntyre's* lone pamphleteer.⁷³ Voters should care about the lack of local oversight of these groups because they are multi-million dollar spenders in many state elections. Significantly, democratically elected lawmakers in twenty-one states have chosen to bar corporate and/or union money from being contributed in state elections.⁷⁴ Spending by the Governors Associations allows otherwise banned money from corporations and unions into state elections.

According to the Center for Responsive Politics and the Center for Public Integrity, the amounts that the RGA has raised and spent have only increased over time:⁷⁵

72. *Vermont v. Republican Governors Ass'n*, No. 759-10-2010 WNCV, slip op. at Civ. 11 (Vt. Sup. Ct. Oct. 3, 2011).

73. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (excusing from an Ohio disclosure regulation a pamphleteer who made her own pamphlets to distribute to her neighbors on a ballot issue).

74. STATE OF MAINE COMM'N ON GOVERNMENTAL ETHICS AND ELECTION PRAC., *supra* note 64.

75. *527s Organizations Republican Governors Assn: Overview*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/527s/527cmtedetail.php?ein=113655877> (last visited Mar. 4, 2012) (listing raised and spent budgets for 2004–2010).

TABLE 1: REPUBLICAN GOVERNORS ASSOCIATION
BUDGET 2002-2010

Year	Raised	Spent
2002 ⁷⁶	\$6,729,860	\$6,030,511
2004	\$33,848,421	\$34,301,889
2006	\$42,428,671	\$43,068,696
2008	\$58,942,152	\$44,625,517
2010	\$143,264,659	\$189,263,372
RGA Totals	\$285,213,763	\$317,289,985

The Center for Responsive Politics and the Center for Public Integrity report that the DGA has raised and spent less than half as much as the RGA over the same eight-year period—but still well over \$150 million total.⁷⁷

TABLE 2: DEMOCRATIC GOVERNORS ASSOCIATION
BUDGET 2002-2010

Year	Raised	Spent
2002 ⁷⁸	\$16,115,036	\$16,913,291
2004	\$24,172,761	\$24,125,938
2006	\$28,640,415	\$28,679,628
2008	\$35,831,960	\$26,376,784
2010	\$55,362,218	\$64,708,253
DGA Totals	\$160,122,390	\$160,803,894

When Tables 1 and 2, above, are considered in tandem, the Governors Associations together have spent nearly half a billion dollars in five election cycles over eight years. The ever-increasing spending by both Governors Associations undermines an argument, now in vogue, that transparency chills political speech.⁷⁹ Contradicting the arguments presently being made by those hostile to campaign finance dis-

76. The 2002 numbers come from the Center for Public Integrity. *See Silent Partners, Republican Governor Association, 2002 Totals*, CTR. FOR PUB. INTEGRITY <http://projects.publicintegrity.org/527/profile.aspx?act=dir&sub=1&cycle=2002&id=479> (copy of data on file with the author).

77. *527s Organizations Democratic Governors Assn: Overview*, *supra* note 75.

78. *See Silent Partners, Democratic Governors Association, 2002 Totals*, CTR. FOR PUB. INTEGRITY <http://projects.publicintegrity.org/527/profile.aspx?act=dir&sub=1&cycle=2002&id=479> (copy of data on file with the author).

79. Kimberley A. Strassel, *Obama's 'Gangster Politics'*, WALL ST. J., May 5, 2011, <http://online.wsj.com/article/SB10001424052748703992704576305414137806694.html>; John Yoo & David W. Marston, *Overruling Citizens United with Chicago-Style Politics: Federal Contract Bidders Must Disclose Political Giving*, AM. ENTER. INST. LEGAL OUTLOOK (July 20, 2011), <http://www.aei.org/outlook/101066>.

closure laws, the Governors Associations have been transparent since 2002, reporting money going in and out of each organization in public filings with the IRS, and yet their donors continue to give greater sums year after year.⁸⁰ To ask whether these donors might have given even more had there been no disclosure is an impossible counterfactual. First, we cannot change history. Secondly, even if we could retroactively change the law to remove transparency, we would not know the size of any of the donations under an opaque system. Nonetheless, donations of hundreds of thousands of dollars at a time to each of the Governors Associations have increased over the period this article studies.

E. Magnitude of the Governors Associations as Funders in Gubernatorial Elections

Over the last twelve years, the DGA and the RGA have poured millions of dollars directly into state election campaigns to candidates and political parties. According to the National Institute on Money in State Politics, the RGA made political contributions totaling \$70,980,226 in thirty-nine states between 1999 and 2011, \$38,782,493 of which was in the form of direct contributions to Republican candidates.⁸¹ Meanwhile, the DGA made political contributions totaling \$51,434,696 in forty-seven states between 1999 and 2011, \$21,914,221 of which was in the form of direct contributions to Democratic candidates.⁸² Most of the balance of the Governors Association's in-state expenditures went to state Republican and Democratic party committees, respectively.⁸³ Once money is given to a state party committee it becomes subject to the laws of the state. However, given that many states have bans on corporate and union money in party committees, it is not entirely clear why the Governors Associations are allowed to give donations in these states in the first place. Furthermore, in addition to making direct contributions, the Governors Associations also spent independently in certain state elections.⁸⁴

80. See Tables 1–2.

81. *Noteworthy Contributor Summary, Republican Governors Association 1999–2011*, NAT'L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/topcontributor.phtml?u=4969&y=0> (last visited Feb. 12, 2012).

82. *Id.*

83. *527s Organizations Democratic Governors Assn: Overview*, *supra* note 75 (listing contributions to state party committees totaling \$28,182,248); *id.* (listing contributions to state party committees totaling \$33,379,919).

84. *IE Spenders Results*, NAT'L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/search.phtml?searchbox=repUBLICAN+governors+association&CurrentType=IE+Spenders> (last visited Jan. 31, 2012) (showing that from 2008 to

In the last decade, the largest individual beneficiary of the RGA was the candidate committee of the then Governor of Mississippi, Haley Barbour, which received \$8,455,000 in campaign contributions,⁸⁵ while the candidate committee of then Governor of Iowa, Chet Culver, the largest individual beneficiary of the DGA, received \$2,913,500 in campaign contributions.⁸⁶ Over the past decade, the state political parties receiving the most money from the Governors Associations were the Florida Republican Party (\$9,625,000)⁸⁷ and the Missouri Democratic Party (\$4,861,400).⁸⁸

According to the National Institute on Money in State Politics, as seen in Appendix Table 5, below, in 2010 the RGA or the DGA played a substantial role as a top twenty contributor in eighteen of the thirty-seven gubernatorial election.⁸⁹ In ten of those states, the RGA or DGA was either the largest or second largest contributor. The story was similar in 2008, as seen in Appendix Table 6, below, when eleven states held gubernatorial elections. In seven of those states, the RGA or DGA was a top twenty contributor. In Montana, the DGA was the largest contributor, and in Delaware it was the second largest contributor. In 2006, the Governors Associations were top twenty contributors in fourteen states; of those, the DGA was the largest contributor in Oregon,⁹⁰ and the second biggest contributor in Arkansas⁹¹ and New

2010, the RGA spent independently in Alaska, Idaho, Oklahoma, Ohio, North Carolina, Massachusetts, Maine, Wisconsin, and Washington State).

85. *527s Organizations Republican Governors Assn: Overview*, *supra* note 75.

86. *527s Organizations Democratic Governors Assn: Overview*, *supra* note 75. Governor Culver was Federal Liaison for the DGA to Congress. *About Chet Culver*, CHESTER CULVER GRP. LLC (2011), <http://www.chetculvergroup.com/aboutchet>.

87. *527s Organizations Republican Governors Assn: Overview*, *supra* note 75.

88. *527s Organizations Democratic Governors Assn: Overview*, *supra* note 75.

89. The DGA and/or RGA did not show up as a top 20 contributor in the following states which had governor's races in 2010: California, Nevada, Utah, Wyoming, Colorado, Nebraska, Kansas, Oklahoma, Minnesota, Wisconsin, Alabama, Vermont, New York, Massachusetts, Connecticut, Rhode Island, Maryland, Alaska, and Hawaii. This does not mean that they were absent from these elections. For example in California, the RGA gave the California Republican Party \$2 million in 2010, however in the context of the expensive California governor's race, this contribution did not make the top 20. See *California 2010, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=CA&y=2010 (last visited Feb. 01, 2012).

90. *Oregon 2006, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=OR&y=2006 (last visited Feb. 01, 2012).

91. *Arkansas 2006, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=AR&y=2006 (last visited Feb. 01, 2012).

Hampshire.⁹² In 2004, the Governors Associations were top twenty contributors in eight states; of those, the RGA was the biggest contributor in Indiana⁹³ and North Dakota,⁹⁴ and the DGA was the second biggest contributor in Missouri,⁹⁵ Utah⁹⁶ and Washington State.⁹⁷ This data therefore shows that the Governors Associations play a significant role in funding state elections all over the United States.

F. The Sources of Money for the RGA and the DGA

So where did the money in the coffers of the RGA and the DGA come from? When the complete data set of RGA and DGA donors are examined, as displayed in Table 3, below, the Michigan Chamber of Commerce, the Republican National Committee, five unions, five individuals, and eight companies are among the top donors. Of the top corporate donors to the Governors Associations, seven of the eight are publicly traded. The following chart lists the biggest twenty aggregate donors from the combined 2002–2010 data set of donations to the Governors Associations.

92. *New Hampshire 2006, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=NH&y=2006 (last visited Feb. 01, 2012).

93. *Indiana 2004, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=IN&y=2004 (last visited Feb. 01, 2012).

94. *North Dakota 2004, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=ND&y=2004 (last visited Feb. 01, 2012).

95. *Missouri 2004, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=MO&y=2004 (last visited Feb. 01, 2012).

96. *Utah 2004, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=CUT&y=2004 (last visited Feb. 01, 2012).

97. *Washington 2004, State Overview, Table 3: Top 20 Contributors*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=WA&y=2004 (last visited Feb. 01, 2012).

TABLE 3: LARGEST AGGREGATE DONORS TO THE DGA AND RGA, 2002-2010⁹⁸

Aggregate Rank	Donor	Aggregate Amount
1.	AFSCME	\$16,171,654
2.	Bob Perry	\$11,200,000
3.	Michigan Chamber of Commerce	\$5,372,500
4.	Pfizer	\$4,657,715
5.	GlaxoSmithKline	\$3,882,861
6.	SEIU	\$3,854,094
7.	Steven Cohen	\$3,500,000
8.	Richard Devos Sr.	\$3,300,000
9.	AT&T	\$3,071,862
10.	Paul Singer	\$2,880,832
11.	National Education Association	\$2,540,945
12.	American Federation of Teachers	\$2,257,000
13.	Eli Lilly	\$2,159,690
14.	Citigroup	\$2,069,141
15.	AstraZeneca	\$2,043,209
16.	Contran Corp	\$1,810,000
17.	Republican National Committee	\$1,758,584
18.	Sheet Metal Workers International Association	\$1,513,500
19.	David Koch	\$1,351,000
20.	News Corp	\$1,251,950

The money flowing into the RGA and DGA has only increased in magnitude over time. In both 2002 and 2004, there was only one donor that contributed over \$1 million, AFSCME;⁹⁹ but by 2010, eleven donors gave donations of \$1 million or more to the Governors Associations.¹⁰⁰ As Appendix Table 7, below, shows, many of the largest

98. *Open Data Initiative*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/resources/create/data.php> (last visited Aug. 26, 2011) (Raw data was downloaded on the “last visited” date, hand coded, and analyzed by the author).

99. *Democratic Governors Assn: Top Contributors, 2004 Cycle*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2004&ein=521304889 (last visited Feb. 12, 2012) (listing AFSCME donations in 2004 at \$2,310,000); *Silent Partners, Democratic Governors Assn.*, CTR. FOR PUBLIC INTEGRITY (data on file with the author).

100. These 11 donors for 2010 are Sheldon Adelson, Steven Cohen, Contran Corp, Richard Devos, Republican State Leadership Committee, AFSCME, Bob Perry, David Koch, Paul Singer, News Corp and the Michigan Chamber of Commerce. *Democratic Governors Assn: Top Contributors, 2010 Cycle*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2010&ein=

donors are also repeat givers. There appears to be a partisan preference among the largest donors, who overwhelmingly (11 of 12) contributed to the RGA exclusively. By contrast, most of the union donations from 2002 to 2010 went to the DGA.¹⁰¹ However, the Service Employees International Union (SEIU), the Laborers' International Union of North America (LIUNA), and the Carpenters Union contributed to the RGA as well.¹⁰²

The Governors Associations draw from an overlapping pool of donors. The Center for Public Integrity tracked the top fifty donors to both groups from 2002 to 2006.¹⁰³ In that time frame, of the top donations to the RGA and DGA, from one hundred sixty-nine unique donors, forty-seven of them gave to both groups. Over the 2002–2006 period, fifty-two top donors were loyal to the Democrats and seventy-two of the top donors were loyal to Republicans.¹⁰⁴ In 2008 and 2010, the RGA and DGA continued to receive funding from an overlapping pool of donors. Of the forty-nine top donors that gave to the Governors Associations in 2008 and 2010, eight donors gave to both groups.¹⁰⁵

A few clear patterns emerge. Of the three hundred top donations to the Governors Associations from 2002 to 2006, contributions came from three limited partnerships, four Native American tribes,¹⁰⁶ five

521304889 (last visited Feb. 01, 2012); *Republican Governors Assn: Top Contributors, 2010 Cycle*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2010&ein=113655877 (last visited Feb. 01, 2012). It should be noted that the Center for Responsive Politics adds individual donations along with corporate donations for their “Top 20 Contributors” charts. Here, the author looked at the underlying IRS forms filed by the RGA and DGA to confirm whether the donation was actually from David Koch (the man) or Koch Industries (the entity).

101. *Open Data Initiative*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/resources/create/data.php> (last visited Aug. 26, 2011) (Raw data was downloaded on the “last visited” date, hand coded, and analyzed by the author). The coded data is available at <http://www.law.stetson.edu/faculty/torres-spelliscy-ciara/media/Final%20RGA%20DGA%20Donor%20List%202002-2010.pdf>.

102. *Id.*

103. *Silent Partners, Democratic Governors Association*, *supra* note 78; *Silent Partners, Republican Governors Association*, *supra* note 76.

104. *Democratic Governors Assn: Top Contributors, 2008 Cycle*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2008&ein=521304889 (last visited Feb. 01, 2012); *Republican Governors Assn: Top Contributors, 2008 Cycle*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2008&ein=11365877; *Democratic Governors Assn: Top Contributors, 2010 Cycle*, *supra* note 100; *Republican Governors Assn: Top Contributors, 2010 Cycle*, *supra* note 100.

105. Seven of those double givers were publicly-traded companies. *Id.*

106. At least one of the Native American tribes in the top fifty donors, the Mississippi Band of Choctaws, was involved in the Jack Abramoff scandal. This may ex-

political party committees, seven limited liability companies, twelve individuals, fourteen associations, sixteen labor unions, twenty-five privately held companies, and eighty-three publicly traded companies. Only two unions gave to both Governors Associations, whereas thirty-seven publicly traded companies gave to both groups. Among the forty-nine top donors from 2008 to 2010, one was a limited partnership, one was a limited liability company, two were associations, three were political party committees, three were trade associations, four were individuals, six were privately held companies, ten were labor unions, and nineteen were publicly-traded corporations.¹⁰⁷

Shifting focus to the corporate money donated to the Governors Associations from 2002 to 2010, after sifting through over 28,000 discrete donations over the eight-year period, the data shows the following:

plain why the tribe is listed as a major donor in 2004. See Susan Schmidt, *A Jackpot From Indian Gaming Tribes*, WASH. POST (Feb. 22, 2004), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/06/AR2006030600702.html>.

107. *Democratic Governors Assn: Top Contributors, 2010 Cycle*, *supra* note 100; *Republican Governors Assn: Top Contributors, 2010 Cycle*, *supra* note 100; *Democratic Governors Assn: Top Contributors, 2008 Cycle*, *supra* note 104; *Republican Governors Assn: Top Contributors, 2008 Cycle*, *supra* note 104.

TABLE 4. CORPORATE DONATIONS TO THE GOVERNORS ASSOCIATIONS, 2002-2010¹⁰⁸

Total Corporate Money to RGA	\$149,640,169
Total Corporate Money to DGA	\$78,519,656
Total Donations (Public and Private Companies)	\$227,891,625
Total (Public Companies) ¹⁰⁹	\$150,235,292
Total (Private Companies)	\$77,666,333
Percent of Corporate Donations from Public Corporations	65.9%
Public Corporations Donating to Both RGA and DGA	349
Public Corporations Donating to RGA Only	240
Public Corporations Donating to DGA Only	59
Total Public Corporate Donors ¹¹⁰	648

In other words, Table 4 demonstrates that corporate money is flowing into both the RGA and DGA, often from an overlapping pool of corporate donors, and that a majority of that corporate money (65.9%) is from publicly traded corporations.¹¹¹ Corporate donors,

108. This table includes donations from both corporate treasuries and corporate PACs. The PACs of publicly traded companies account for \$2.8 million in donations to the Governors Associations. In other words, roughly ninety-five percent of the publicly traded money in this table is from a corporate treasury. Also, private companies listed in this chart spent \$326,025 through PACs.

109. The author grouped LLCs, LPs, and LLPs with their affiliated parent public company by “doing business as” (dba) trade names. For example, Best Buy Purchasing, LLC and Best Buy were grouped together as public donations from the parent Best Buy Co., Inc. This methodology may undercount the money attributable to spending by public companies’ affiliated entities if the affiliated entity does not contain the dba name. For example, Enron had many off-balance sheet affiliates with names that did not contain its trademark “Enron;” one such entity was named “Chewbacca.” This methodology would miss the affiliation between Enron and Chewbacca.

110. Six of these 648 donors are PACs associated with publicly traded companies. If these six are excluded, the total adjusts down to 642 public companies. The PACs are associated with CIWV—Citizens Financial, FSGI—First Security Bank, MPRW—Mississippi Power Company, NAII—Natural Alternatives International, STI—Suntrust Bank, and WDR—Waddell Reed Company.

111. The fact that there are overlapping donors to Republican and Democratic groups has been noted at the federal level as well. DAN CLAWSON ET AL., *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* 91 (1998) (“The country doesn’t have two major parties, it has just one: the money party. Members of Congress, governors, presidents, and virtually all of the ‘serious’ challengers are past winners in the money primary; in order to win that primary they had to make implicit (or explicit) commitments to the money party.”); Donald Green, *The Need for Federal Regulation of State Party Activity*, in *INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS* 97, 106 (Anthony Corrado

both publicly traded and privately held, give more of their money to the RGA than to the DGA, and a greater pool of corporate donors gave exclusively to the RGA as compared to the DGA, which had fewer loyal corporate donors.

An equally important fact to note from Appendix Tables 5 and 6, below, is that many of the states where the Governors Associations are major political spenders are states where the law barred corporations and/or unions from giving to state PACs during the 2002–2010 time period. These states are: Arizona,¹¹² Iowa,¹¹³ Michigan,¹¹⁴ North Dakota,¹¹⁵ Ohio,¹¹⁶ Pennsylvania,¹¹⁷ South Dakota,¹¹⁸ Tennessee,¹¹⁹ and Texas.¹²⁰ The other states that ban corporations and/or unions from donating to PACs are Alaska,¹²¹ Colorado,¹²² Connecticut,¹²³ Ken-

et al. eds., 2003) (“[D]onors seem to throw ideological affinity to the wind, ensuring instead that whichever party wins remains in their debt The tactic of two-party donations has become common place . . . [And] it strains credulity to think that their evenhanded distribution of shareholders’ money to both parties grows out of their desire to foster democratic discourse.”).

112. ARIZ. REV. STAT. ANN. § 16-919 (2011) (barring corporations and unions from making “any contribution of money or anything of value for the purpose of influencing an election”).

113. IOWA CODE § 68A.503(1) (2003) (“It is unlawful for . . . [a] corporation . . . to contribute any money, property, labor, or thing of value, directly or indirectly, to a committee, or to expressly advocate that the vote of an elector be used to nominate, elect, or defeat a candidate for public office, except that such resources may be so expended in connection with a . . . ballot issue.”).

114. MICH. COMP. LAWS § 169.254(1) (2009) (“[A] corporation . . . or labor organization shall not make a contribution or expenditure . . .”).

115. N.D. CENT. CODE § 16.1-08.1-03.3(1) (“A corporation, cooperative corporation, limited liability company, or association may not make a direct contribution: []To aid any political party, political committee, or organization”); *see also* § 16.1-08.1-03.5 (noting certain exceptions to the ban on corporate contributions and expenditures).

116. OHIO REV. CODE ANN. § 3599.03 (West 2011) (Corporations and unions are barred from spending “for or in aid of or opposition to a political party, a candidate for election or nomination to public office, a political action committee . . .”).

117. 25 PA. CONS. STAT. § 3253(a) (West 2011) (Corporations are barred from “mak[ing] a contribution or expenditure in connection with the election of any candidate or for any political purpose . . .”).

118. S.D. CODIFIED LAWS § 12-27-18 (2011) (barring organizations from donating to a candidate committee or political party). South Dakota includes a “business corporation” in the definition of an “organization.” § 12-27-1(16) (2011).

119. TENN. CODE ANN. § 2-19-132 (2010), *repealed by* 2010 Pub. Acts ch. 1095, § 1 (2010) (Tennessee previously barred corporations from “contributing to the campaign fund of any political party, for any purpose whatever.”).

120. TEX. ELEC. CODE ANN. § 253.094 (West 2011) (barring corporate and union contributions and expenditures).

121. ALASKA STAT. § 15.13.074(f) (2012) (Corporations and unions “may not make a contribution to a candidate, group, or nongroup entity . . .”).

122. COLO. CONST. art. 28, § 3(4)(a) (“It shall be unlawful for a corporation or labor organization to make contributions to a candidate committee or a political party, and

tucky,¹²⁴ Massachusetts,¹²⁵ Minnesota,¹²⁶ Montana,¹²⁷ North Carolina,¹²⁸ Oklahoma,¹²⁹ Rhode Island,¹³⁰ West Virginia,¹³¹ Wisconsin,¹³² and Wyoming.¹³³ All of the foregoing states, except Kentucky and Massachusetts, have had one or both of the Governors Associations spend money in their state over the past decade. In other words, if the Governors Associations had been subject to PAC regula-

to make expenditures expressly advocating the election or defeat of a candidate”), *invalidated in re Interrogatories Propounded by Governor Ritter on Certain Provisions of Article XXIII of Constitution of State*, 227 P.3d 892, 893 (Colo. 2010).

123. CONN. GEN. STAT. § 9-613 (2010) (“No business entity shall make any contributions or expenditures to, or for the benefit of, any candidate’s campaign for election to any public office”).

124. KY. REV. STAT. ANN. § 121.035(1) (2011) (“No corporation . . . shall . . . give . . . any money, privilege, favor, or other thing of value to any political or quasi-political organization”).

125. MASS. GEN. LAWS ch. 55 § 8 (2011) (“No corporation . . . shall directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party.”).

126. MINN. STAT. § 211B.15 subdiv. 2 (2011) (“A corporation may not make an expenditure or offer or agree to make an expenditure to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office, unless the expenditure is an independent expenditure.”).

127. MONT. CODE ANN. § 13-35-227 (2011) (“A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.”).

128. N.C. GEN. STAT. § 163-278.19(a) (2012) (“[I]t shall be unlawful for any corporation, business entity, labor union, professional association or insurance company directly or indirectly do [sic] any of the following: []To make any contribution to a candidate or political committee”).

129. OKL. STAT. ANN. Tit. 21, § 187.2(A) (2011) (“No corporation shall contribute to any campaign fund of any party committee of this state or to any other person for the benefit of such party committee or its candidates”).

130. R.I. GEN. LAWS § 17-25-10.1(h)(1) (2012) (“It shall be unlawful for any corporation, whether profit or non-profit, domestic corporation or foreign corporation . . . or other business entity to make any campaign contribution or expenditure . . . to or for any candidate, political action committee, or political party committee”).

131. W. VA. CODE § 3-8-8(a) (2011) (“An officer, agent or person acting on behalf of any corporation, whether incorporated under the laws of this or any other state or of a foreign country, may not pay, give, lend or authorize to be paid, any money or other thing of value belonging to the corporation to any candidate or candidate’s campaign for nomination or election to any statewide office or any other elective office in the state or any of its subdivisions.”).

132. WIS. STAT. § 11.38(1)(a)(1) (2012) (“No foreign or domestic corporation, or association organized under ch. 185 or 193, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.”).

133. WYO. STAT. ANN. § 22-25-102(a) (2012) (No corporation or union “shall contribute funds, other items of value or election assistance directly to any candidate or group of candidates.”).

tion in these states, they would not have been able to make political donations to parties or candidates in these states' elections because of the corporate and union money in their coffers.¹³⁴ This may explain why the RGA contributes money through an affiliated PAC in, among other states, Arizona,¹³⁵ Maine,¹³⁶ South Dakota,¹³⁷ and Texas,¹³⁸ according to the campaign finance filings in these states. However, there appears to be a considerable difference in how the RGA reports to the IRS and how it reports to state election regulators. For example, in Texas in 2010, the RGA reported to the IRS that it made a contribution of \$3 million to Texans for Perry from the RGA itself.¹³⁹ Meanwhile, the RGA informed the Texas Ethics Commission that this \$3 million for Texans for Perry had come from its individually funded Michigan PAC.¹⁴⁰ A similar reporting discrepancy also appears in Arizona where the RGA Arizona PAC 2010 reported giving \$200,000 to the Arizona Republican Party on October 5, 2010.¹⁴¹ Meanwhile on

134. The violation of state campaign finance laws banning the use of corporate money carries criminal penalties in many states. This is precisely why Tom Delay was charged criminally in Texas. See R. Jeffrey Smith, *Texas Grand Jury Indicts Rep. Tom DeLay*, WASH. POST, Sept. 29, 2005, <http://www.washingtonpost.com/wp-dyn/content/discussion/2005/09/28/DI2005092801916.html>.

135. *Arizona 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=AZ (last visited Mar. 4, 2012).

136. *Maine 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=ME (last visited Mar. 4, 2012).

137. Republican Governors Assn—SD PAC, Candidate's or Committee's Report of Receipts and Expenditures (Oct. 31, 2006), <http://apps.sd.gov/applications/st12odrs/files/0000003296.pdf> (listing two individual donors to the PAC and \$100,000 in expenditures).

138. *Texas 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=TX (last visited Mar. 4, 2012).

139. Republican Governors Assn's IRS Form 8872 (for the period beginning 10/01/2010 and ending 11/22/2010), IRS, <http://forms.irs.gov/politicalOrgsSearch> (follow the "Search Political Organization Disclosures" hyperlink; select "Form 8872"; then search "Organization Name" for "Republican Governors Association" and search "Date Form Posted" for "10/01/2010" and "11/22/2010.") (listing a \$3,000,000 donation from the RGA to Texans for Rick Perry).

140. See Letter from the Republican Governors Association to the Texas Ethics Commission (Oct. 25, 2010), <http://204.65.203.5/public/docs/FEC1242.pdf> (listing a \$3,000,000 donation from the RGA Michigan 2010 PAC to Texans for Rick Perry and certifying that no corporate or union money funded the PAC).

141. RGA ARIZONA PAC 2010, CAMPAIGN FIN. REPORT, 2010 PRE-GEN. ELECTION REPORT (Oct. 14, 2010), <http://www.azsos.gov/cfs/PublicReports/2010/CDE7B678-6F32-4B1C-8082-A414358F8E8F.pdf> (reporting for the period between Sept. 14, 2010-Oct. 13, 2010, listing \$200,000 to the Arizona Republican Party); see also AZ REPUBLICAN PARTY, CAMPAIGN FIN. REPORT, 2010 PRE-GEN. ELECTION REPORT (Oct. 20, 2010) <http://www.azsos.gov/cfs/PublicReports/2010/0F4982AC-57D4-4037-8D26-E58AC8C54F79.pdf> (reporting for the period between Sept. 14, 2010-Oct. 13, 2010, listing \$200,000 from the RGA Arizona PAC 2010 to the Arizona Republican Party).

the RGA's IRS forms, it appears that this \$200,000 went from RGA itself to the Arizona Republican Party on October 5, 2010.¹⁴² Furthermore, it appears that some RGA state PACs are merely alter egos for the RGA, where the RGA has contributed millions of dollars directly to these state PACs.¹⁴³

II.

WHY CAN'T STATES REGULATE THE DGA AND RGA AS PACS?

A. *The Federal Major Purpose Test*

The difficulty for states in regulating the Governors Associations as PACs is rooted in *Buckley v. Valeo*, the foundation for much of modern campaign finance jurisprudence.¹⁴⁴ In *Buckley*, the Supreme Court interpreted the Federal Election Campaign Act (FECA) term "political committee" to include only those organizations "that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related."¹⁴⁵ This analysis is known as the major purpose test.

The practical result of this test is that, as former FEC Commissioner Trevor Potter once put it, "regardless of a non-candidate organization's campaign finance activities, the organization is a political committee under federal law only if its 'major purpose' is to nominate or elect a candidate."¹⁴⁶ Thus, under *Buckley*, donations to political committees are constitutionally reportable, but donations to nearly

142. Republican Governors Assn's IRS Form 8872 (for the period beginning 10/01/2010 and ending 11/22/2010), <http://forms.irs.gov/politicalOrgsSearch> (follow the "Search Political Organization Disclosures" hyperlink; select "Form 8872"; then search "Organization Name" for "Republican Governors Association" and search "Date Form Posted" for "10/01/2010" and "11/22/2010") 2010 (showing \$200,000 contribution to Arizona Republican Party on October 5, 2010).

143. Republican Governors Assn's IRS Form 8872 (for the period beginning 10/01/2010 and ending 11/22/2010), <http://forms.irs.gov/politicalOrgsSearch> (follow the "Search Political Organization Disclosures" hyperlink; select "Form 8872"; then search "Organization Name" for "Republican Governors Association" and search "Date Form Posted" for "10/01/2010" and "11/22/2010") 2010 (showing donations from the RGA to RGA Ohio PAC of \$923,454, \$1,138,000 and \$1,000,000 within the span of three days).

144. WRITING REFORM, *supra* note 33, at I-1 to I-9.

145. *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976).

146. Trevor Potter, *The Current State of Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 48, 50-51 (2005).

identical organizations devoted primarily to the discussion of political, yet non-electoral, issues thus remain outside the sweep of FECA's reporting requirements.¹⁴⁷ As will be discussed further below, the major purpose test is stymieing the efforts of state elections regulators to safeguard their elections from unregulated spending, including from otherwise banned corporate sources.¹⁴⁸

The Supreme Court elaborated on the major purpose test in 1986, in *Massachusetts Citizens for Life (MCFL)*, noting in dicta that the pro-life group in question could become a political committee if its independent spending were to become "so extensive that its major purpose could be regarded as campaign activity."¹⁴⁹

As election law expert Professor Edward Foley indicates, the trick is how the major purpose test applies to a politically active group in a real election: "Questions, however, inevitably arise concerning how to implement this 'major purpose' test."¹⁵⁰ The Supreme Court unhelpfully ducked its most recent chance to clarify the application of the major purpose test in *Akins* in 1998. Rather than deciding whether the American Israel Public Affairs Committee (AIPAC) was a federal PAC under FECA, the Supreme Court punted the question back to the FEC. The *Akins* Court stated:

A considered determination of the scope of the statutory exemption that Congress enacted to address membership communications would helpfully inform our consideration of the "major purpose" test. The upshot, in our view, is that we should permit the FEC to address, in the first instance, the issue presented. . . . We can thereby take advantage of the relevant agency's expertise, by allowing it to develop a more precise rule that may dispose of this case, or at a minimum, will aid the Court in reaching a more informed conclusion.¹⁵¹

By avoiding the opportunity to squarely address the contours of the major purpose test, the Supreme Court left election administrators at

147. Cf. WRITING REFORM, *supra* note 33, at I-8. If an organization primarily concerned with an issue distributes voter guides, the organization can be subject to contributor reporting. See *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1001–02 (9th Cir. 2010).

148. See generally WRITING REFORM, *supra* note 33 at VII-11 to VII-12.

149. *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986); see also Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1011–12 (2005) (discussing *MCFL* and major purpose).

150. Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341, 352 (2004).

151. *FEC v. Akins*, 524 U.S. 11, 29 (1998).

the FEC and in states across the country with the unenviable task of trying to figure out its application on their own.

B. How Does the FEC Apply the Major Purpose Test?

If states are looking for clear guidance from the federal government about the contours of the major purpose test, their search will be in vain. For one, states' definitions of PACs rarely, if ever, match the federal definition of PACs. As promulgated by the FEC, the Code of Federal Regulations defines a PAC in the following way, without any reference to the major purpose test:

Political committee means any group meeting one of the following conditions:

(a) . . . any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 or which makes expenditures aggregating in excess of \$1,000 during a calendar year is a political committee.

(b) Any separate segregated fund established under 2 U.S.C. 441b(b)(2)(C) is a political committee¹⁵²

In other words, the FEC's rules define two types of organizations as PACs: separate segregated funds (SSFs), which are created by corporations or unions,¹⁵³ and nonconnected political committees, which are financially independent.¹⁵⁴ According to guidance from the FEC, "The sponsor of the SSF (i.e., its 'connected organization'), the corporation, labor organization or incorporated membership organization may absorb all the costs of establishing and operating the SSF and soliciting contributions to it."¹⁵⁵ In contrast, "[T]he nonconnected political committee must pay for its own administrative expenses, using the contributions it raises."¹⁵⁶ Both SSFs and nonconnected PACs may accept hard money donations up to five thousand dollars per contributor if the SSF or PAC complies with the requirements to be a multicandidate committee.¹⁵⁷

As Professor Miriam Galston has articulated, federal PAC status requires both the satisfaction of the statutory requirements of FECA,

152. 11 C.F.R. § 100.5.

153. 11 C.F.R. § 100.6.

154. 11 C.F.R. § 102.1(d).

155. *SSFs and Nonconnected PACs*, FEC (May 2008), <http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml>.

156. *Id.*

157. The requirements for a multicandidate committee include: (1) having been registered with the FEC for at least six months; (2) having received contributions from over fifty persons; and (3) having made contributions to at least five candidates for federal office. 11 C.F.R. § 100.5(e)(3).

as well as the judicially created major purpose test. “In recent years, however, the [FEC] has usually taken the position that political committee status presupposes satisfying both the statutory and the judicially created tests.”¹⁵⁸ Despite the fact that the FEC ostensibly applies the major purpose test in determining federal PAC status, the test has not been fully incorporated into the actual text of the FEC’s regulations. For a decade after *Buckley*, the FEC declined to impose the major purpose test, relying instead on a purely statutory test. In other words, if a group met the statutory definition under FECA to be a PAC, then it was a PAC for federal election purposes.¹⁵⁹

The FEC changed tactics in an advisory opinion in 1995.¹⁶⁰ In 2003 and 2004, the FEC considered promulgating new regulations that would have applied the major purpose test to its definition of political committees;¹⁶¹ however, the FEC ultimately decided against that move.¹⁶² Despite this decision, however, in February 2007 the FEC published an explanation of its case-by-case application of the major purpose test and why it did not sweep all 527 groups into the PAC definition.¹⁶³ “According to the FEC, section 527 status alone is not determinative of whether an organization is a political committee under FECA. It found that an organization’s section 527 status does not necessarily satisfy FECA and the Supreme Court’s contribution,

158. Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1220–21 (2007).

159. FEC Advisory Op. 1988-22 (July 5, 1988) (stating that a group seeking to support the election of more Republicans in a certain area would become a political committee if its distributions or expenditures exceeded one thousand dollars per year); FEC Advisory Op. 1979-41 (Sept. 13, 1979), available at <http://saos.nictusa.com/saos/searchao?AONUMBER=1979-41> (stating that the National Committee for a Democratic Alternative would become a political committee if it ran advertisements opposing Jimmy Carter’s nomination as the Democratic candidate for President).

160. See FEC Advisory Op. 1995-11 n.10 (Apr. 28, 1995), available at <http://saos.nictusa.com/saos/searchao?AONUMBER=1995-11> (adopting the major purpose test).

161. Political Committee Status, 69 Fed. Reg. 11,736 (proposed on Mar. 11, 2004) available at <http://www.gpo.gov/fdsys/pkg/FR-2004-03-11/pdf/04-5290.pdf>.

162. See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 60,056 (Nov. 23, 2004) (to be codified at 11 C.F.R. pt. 100) (indicating decision not to adopt revised definition and defending “major purpose” test); Brian DeBose & Ralph Z. Hallow, *FEC Delays 527 Nonprofit Restrictions, GOP Now Seeks Own Soft-Money Machines*, WASH. TIMES, May 14, 2004, at A3 (reporting vote by FEC rejecting proposal for revised major purpose test).

163. Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (to be codified at 11 C.F.R. pt. 100), available at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-3.pdf.

expenditure, and major purpose requirements.”¹⁶⁴ As some practitioners complain, the FEC has not been crystal clear about when an organization will fall within its regulatory ambit, largely because the agency takes a “facts and circumstances” approach:

The FEC has not elaborated on that construction by regulation, but it has formally explained that it will look at a variety of contextual and behavioral factors beyond the making of contributions and express-advocacy communications in order to determine whether a particular group’s conduct merits political committee status, such as a group’s other kinds of spending that influences federal elections, solicitations of donations, its governing documents, descriptions of its mission and purposes, and other public statements.¹⁶⁵

This “facts and circumstances” approach has the potential to create a notice problem. It puts lawyers advising their politically active multi-purpose clients in the difficult position of not knowing exactly under which circumstances the FEC may intercede. Though it should be noted that in this respect, the FEC’s approach is not unlike that of the IRS, which also uses a “facts and circumstances” test to determine the tax status of political non-profits.¹⁶⁶

C. *What’s the Matter with the Major Purpose Test?*

The first problem with the major purpose test is that different 527 groups, involved in very similar election activities, may be treated very differently under the law. Section 527 groups that are PACs are subject to contribution limits and source restrictions in federal and many state elections. Meanwhile, non-PAC 527s may receive unlimited contributions, including those from corporate and union sources. Because the Governors Associations are not typically treated as state PACs, they are permitted to solicit unlimited contributions, including corporate and union dollars. This allows the Governors Associations to raise money more efficiently than state PACs, which are limited to soliciting smaller hard money donations from individuals. Post-*Citizens United* and *SpeechNow*, federal PACs that only engage in

164. ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., 527 GROUPS AND CAMPAIGN ACTIVITY: ANALYSIS UNDER CAMPAIGN FINANCE AND TAX LAWS 5 (June 12, 2008).

165. B. Holly Schadler & Laurence E. Gold, *The Effect of Citizens United on Tax and Campaign Laws Governing Tax-Exempt Organizations*, 65 EXEMPT ORG. TAX REV. 229, 235 (Mar. 2010).

166. Ezra W. Reese, *The Other Agency: The Impact of Recent Federal Law Enforcement on Nonprofit Political Activity*, 58 TAX ANALYSTS 131 (2007) (citing Rev. Rul. 2004-6, 2004-1 C.B. 328), available at <http://www.moresoftmoneyhardlaw.com/client/files/Reese%20EOTR%20Article.pdf> (discussing the facts and circumstances test by the IRS).

independent expenditures may also take in unlimited contributions. The press dubbed these independent expenditure PACs, “Super PACs”, and they played a significant role in the 2010 midterm elections.¹⁶⁷ Arguably the RGA and DGA are akin to the Super PACs, since they take in unlimited donations and allocate a significant portion of their funding to politics. However, there is a key legal difference between Super PACs and the Governors Associations: Super PACs must act independently of candidates, while the Governors Associations may give directly to candidates and political parties. These direct contributions to candidates and political parties increase the risk of political corruption.

D. *Alternative Approaches to the Major Purpose Test*

Campaign Legal Center attorney Paul S. Ryan has argued that election regulators should cut the Gordian knot of the major purpose test and simply presume that all 527s that spend in federal elections are federal PACs. As Mr. Ryan has articulated: “Section 527 political organizations, by definition, are ‘operated primarily for the purpose’ of accepting contributions or making expenditures to influence ‘the selection, nomination, election, or appointment’ of any individual to public office or office in a political organization.”¹⁶⁸ In 2005, then-chairman of the FEC, Scott Thomas, agreed with this approach of deeming 527s presumptively major purpose organizations.¹⁶⁹ Mr. Ryan’s argument has the appeal of common sense, and conforms with rule of law norms such as treating like entities alike and giving unambiguous notice to potentially regulated entities. If Mr. Ryan’s approach were translated from the federal context into a state context, then every 527 spending in a state election would be considered a state PAC. However, so far, this appealing theoretical approach has not been widely followed in practice.¹⁷⁰

167. See Dan Eggen & T.W. Farnam, *New “Super PACs” Bringing Millions into Campaigns*, WASH. POST (Sept. 28, 2010, 2:05 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/POST,27/AR2010092706500.html>.

168. Ryan, *supra* note 51 at 484.

169. *Hearing to Examine and Discuss S. 271, a Bill Which Reforms the Regulatory and Reporting Structure of Organizations Registered Under Section 527 of the Internal Revenue Code*, 109th Cong. (2005) (testimony of Scott E. Thomas, FEC Chairman), available at <http://rules.senate.gov/hearings/2005/ThomasTestimony.pdf> (“527s, by virtue of their chosen tax status, can be presumed to pass the ‘major purpose’ test”).

170. One notable exception is the Supreme Court of the State of Washington which held that a 527 could not conceal its donors under Washington State law: “VEC fails to justify how it qualifies as a ‘political organization’ but not a ‘political committee.’ Thus, the fact that VEC registered as a ‘political organization’ under section 527 is a

In contrast to Mr. Ryan, Professor Edward Foley has urged the FEC to adopt a 50% threshold for federal PAC status. As Professor Foley argued in his comments to the FEC in its Rulemaking on Political Committee Status:

[A]ny group that spends over 50 percent of its funds on . . . [express advocacy, electioneering communications and public messages that support, promote, attack, or oppose a candidate] is acting as a political committee with the predominant objective of electing or defeating the candidate. Also included with the sorts of activities that we expect of political committees is partisan voter drives that reference a federal candidate and encourage potential voters to register to vote, or go to the polls, in order to support a particular federal candidate and that candidate's team.¹⁷¹

Like Mr. Ryan's "all 527s are PACs" approach, Professor Foley's 50% threshold also has the appeal of being easily administered, and guarantees that political actors are on notice. But Professor Foley's test would lean in the opposite direction of Mr. Ryan's test, presuming instead that most 527s were not PACs.

The trouble with the 50% threshold approach has been explored by Professor Galston. She has noted the paradox that the major purpose test may present for particularly big-budgeted groups—excusing the largest groups from regulations if their huge political expenditures happen to fall below a 50% threshold:

[This is] the major purpose test's counterintuitive implication: if the test requires more than one-half of an organization's activities to seek to influence the election of a federal candidate, it will shelter a group spending \$5,000,000 on such activities from FECA "political committee" status, as long as that sum represents a small portion of its annual expenditures, whereas it would subject a group that spends only \$500,000 to the FECA regime, if it has an annual budget of less than \$1,000,000. . . . Ironically, if the major purpose test is interpreted as quantitative and is satisfied only when more than half of a group's operations qualify as FECA influencing activities, the wealthiest groups will be protected from the burdens of FECA regulation, even though it is precisely these groups that have the resources to comply with the campaign finance rules created to diminish such threats.¹⁷²

persuasive fact that indicates that VEC was seeking the tax benefits of section 527 while disingenuously seeking to avoid the disclosure requirements of the [Fair Campaign Practices Act]." Ryan, *supra* note 51 at 500–01 (quoting Voters Educ. Comm. v. Pub. Disclosure Comm'n, 166 P.3d 1174, 1186 n.14 (2007)).

171. Foley, *supra* note 50, at 368.

172. Galston, *supra* note 158, at 1223.

This “counterintuitive implication” of the major purpose test excluding the biggest groups applies not only in the federal context, but also to groups that work in more than one state for state elections. In other words, the more states in which a group electioneers, paradoxically, the fewer places it must report as a PAC, as it is less likely to satisfy the PAC requirements in any given state.

In addition to the 50% threshold, Professor Foley would have also considered any group with a stated major purpose of influencing elections to be a PAC. As he noted in his comments to the FEC, the Agency could “examine whether the group has issued public pronouncements declaring its primary objective, or core mission (or ‘major purpose’ in similarly equivalent terms), to be the election or defeat of a federal candidate. If so, then the group has self-declared that it meets the ‘major purpose’ test”¹⁷³ This “self-identifying” approach has been adopted by the Fourth Circuit.¹⁷⁴ But the courts have yet to adopt either Professor Foley’s 50% threshold or Mr. Ryan’s “all 527s are PACs” approach. Instead, the courts are embracing an “I know it when I see it” approach to PACs—an approach that the courts previously criticized election officials for taking.¹⁷⁵ From a constitutional structure perspective, the discretion over PAC regulation has been migrating from the executive agencies to the judiciary.

III.

THE CIRCUIT SPLIT: *THE MAJOR PURPOSE* V. A MAJOR PURPOSE

Further complicating matters, the lower courts have split regarding the meaning of *Buckley*’s major purpose language.¹⁷⁶ As if cam-

173. Foley, *supra* note 50, at 369.

174. See *N.C. Right to Life, Inc. v. Leake (NCRTL III)*, 525 F.3d 274 (4th Cir. 2008).

175. *Id.* at 303 (“The statute does not provide notice as to which of these standards apply; this, of course, means that regulators will once again be empowered to make these judgments to the maximum conceivable extent.”); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) (“we are confronted with a vague statute. The flaw in the [law] is that it might be read to cover issue advocacy. Following *McConnell*, that uncertainty presents a problem . . . because it renders the scope of the statute uncertain.”). *But see Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 64 (1st Cir. 2011) (rejecting a vagueness challenge to Maine’s campaign finance law finding, “We thus find the use of ‘promoting,’ ‘support,’ and ‘opposition’ . . . clear enough to ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’”) (internal citations omitted).

176. Compare *NCRTL III*, 525 F.3d at 288–89, with *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1008–09 (9th Cir. 2010). See generally *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 n.21 (9th Cir. 2003) (holding disclosure laws may not impose overly burdensome administrative costs and organizational re-

paigned campaign finance law did not already give practitioners splitting headaches, this particular dispute has created a circuit split on the issue of whether *Buckley* dictates “a” (indefinite article) major purpose test or “the” (definite article) major purpose test. This means that in the Fourth and Tenth Circuits, states are only allowed to regulate as PACs those entities which spend the lion’s share of their resources on in-state elections—severely curtailing the ability of states to regulate politically active multipurpose entities and multistate organizations. Compare this to the Ninth Circuit, where states are permitted to regulate multipurpose political entities as PACs. None of the cases involved in this circuit split over the meaning of the major purpose test squarely address the question of whether the Governors Associations themselves are PACs.

A. *The Fourth Circuit’s Approach—“The” Major Purpose*

In the Fourth Circuit, which is historically a bastion of hostility to campaign finance regulation, North Carolina’s PAC definition has been the subject of multiple legislative changes and an almost decade-long litigation over which organizations would have to register as PACs. Some of these constitutional challenges hinged on an “express advocacy” test,¹⁷⁷ another one of *Buckley*’s progeny.¹⁷⁸ Before *Mc-*

quirements on groups whose major purpose is not campaign advocacy, but who occasionally make independent expenditures); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391–92 (D.C. Cir. 1981) (holding unless a group is under the control of a candidate, or its major purpose is the nomination or election of a candidate, it cannot constitute a “political committee” under the Federal Election Campaign Act); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1311 (S.D. Ala. 2000) (holding the legislature may require disclosure of substantially all expenditures of organizations whose major purpose is election activity regardless of whether they were made for express advocacy, but for organizations whose major purpose lies elsewhere, the legislature may require disclosure only of those expenditures used for express advocacy); *Volle v. Webster*, 69 F. Supp. 2d 171, 174–76 (D. Me. 1999) (holding individuals and groups that are not political committees under the major purpose test can nevertheless be required to report (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate); *N.Y. Civil Liberties Union, Inc. v. Acito*, 459 F. Supp. 75, 84 n.5, 89 (S.D.N.Y. 1978) (holding reporting and disclosure provisions are applicable only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates).

177. See *Cnty. Alliance for a Responsible Env’t v. Leake*, No. 5:00-CV-554-BO(3), slip op. at 8, 12–17 (E.D.N.C. Feb. 22, 2001).

178. *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (express advocacy includes the so-called magic words “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject”); see also *TORRES-SPELLISCY, TRANSPARENT ELECTIONS AFTER CITIZENS UNITED*, *supra* note 56, at 4 (explaining

Connell in 2003, the Fourth Circuit ruled that the definition of a political committee could not encompass organizations that did not engage in express advocacy.¹⁷⁹ In more recent cases, plaintiffs have deployed the major purpose test to invalidate campaign finance laws.

In *North Carolina Right to Life, Inc. v. Leake (NCRTL III)*, the Fourth Circuit struck down a provision that defined a political committee as any organization that has as “a major purpose” the support of a particular candidate.¹⁸⁰ The Fourth Circuit held that under *Buckley*, to regulate an organization as a political committee, “the major purpose” of the organization must be “supporting or opposing a candidate.”¹⁸¹ Including every organization with “a major purpose” of influencing elections would be both unconstitutionally overbroad, because it would sweep in too much constitutionally protected political speech, and unconstitutionally vague, because the statute provided “absolutely no direction” as to what constituted “a major purpose.”¹⁸²

By insisting on “the” major purpose, instead of the more forgiving “a” major purpose, as the constitutional standard, the Fourth Circuit excused most multi-purpose entities from regulation. As the Court stated, “A single organization can have multiple ‘major purposes,’ and imposing political committee burdens on a multi-faceted organization may mean that North Carolina is regulating a relatively large amount of constitutionally protected speech unrelated to elections merely to regulate a relatively small amount of election-related speech.”¹⁸³

While the Fourth Circuit declined to adopt a clear-cut 50% rule, it also criticized North Carolina’s statute for being overly vague. As the court admonished, “Given the vagueness of [section] 163-278.6(14)’s test, it is hard to argue with the plaintiff’s contention that, in designating organizations as political committees, North Carolina is essentially handing out speeding tickets without ‘telling anyone . . . the speed limit.’”¹⁸⁴ Furthermore, the Fourth Circuit was concerned that the North Carolina PAC definition left too much discretion in the hands of election regulators and invited partisan mischief. The court criticized the definition and noted that “[s]ection 163-278.6(14)’s

express advocacy as an advertisement that “say[s] clearly and unequivocally, in so many words, ‘Vote Quimby!’ (or alternatively, ‘Don’t Vote Quimby!’)”.

179. See, e.g., *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (invalidating definition of “political committee” that covered groups not engaging in express advocacy).

180. 525 F.3d 274, 286 (emphasis added).

181. *Id.* at 288 (emphasis added).

182. *Id.* at 289 (emphasis added).

183. *Id.*

184. *Id.* at 290 (internal citations omitted).

‘we’ll know it when we see it approach’ simply does not provide sufficient direction to either regulators or potentially regulated entities. Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject.”¹⁸⁵ In summary, in *NCRTL III*, the Fourth Circuit left multipurpose groups free to spend significantly in North Carolina elections without having to comply with North Carolina’s campaign finance regulations.

The Fourth Circuit did provide some clarity as to how the major purpose test would be applied in day-to-day practice within the Circuit: “Basically, if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under ‘fair warning’ that it may fall within the ambit of *Buckley*’s test.”¹⁸⁶ Thus, in the Fourth Circuit, self-identifying satisfies the *Buckley* major purpose requirement. Although the Fourth Circuit used the word “majority” in defining the scope of the test, in a footnote, it declined to adopt a 50% rule. The plaintiffs argued “that an entity should only fall within the ambit of ‘the major purpose’ test if . . . the organization spends over fifty percent of its money on influencing elections. While this standard would be constitutional, we need not determine . . . whether it is the only manner in which North Carolina can apply the teachings of *Buckley*.”¹⁸⁷ Whether the RGA’s and DGA’s self-descriptions (quoted at length above in Part I.C.) would satisfy the self-identifying test for state PAC purposes in North Carolina or elsewhere remains an open question of law.

B. *The Tenth Circuit Concurs with the Fourth Circuit*

The Tenth Circuit came to a similar conclusion as the Fourth Circuit in interpreting the constitutional contours of the major purpose test. The Tenth Circuit has held in recent cases that states within its jurisdiction are quite curtailed in regulating multi-purpose organizations. It has insisted that an organization may not qualify as a state PAC if electioneering is not its major purpose.¹⁸⁸

185. *Id.*

186. *Id.* at 289.

187. *Id.* at 289 n.6 (internal citation omitted).

188. *See* *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1152–55 (10th Cir. 2007).

In the 2007 case *Colorado Right to Life Committee, Inc. v. Coffman*,¹⁸⁹ the court focused on the major purpose of the organization at issue rather than the major purpose of a particular expenditure.¹⁹⁰ In *Coffman*, the Tenth Circuit held that Colorado's statutory PAC definition was unconstitutional as applied to the plaintiff, Colorado Right to Life (CRLC). The Colorado PAC definition included any group spending more than two hundred dollars a year to support or oppose the nomination or election of one or more candidates. As the court held, "[W]e conclude that [Colorado's] definition of a political committee is unconstitutional as applied to CRLC because it fails to incorporate *Buckley v. Valeo*'s 'major purpose' test."¹⁹¹ As the court went into further detail to explain that it agreed with the lower court's findings, it stated:

The \$200 trigger, standing alone, cannot serve as a proxy for the "major purpose" test as applied to [plaintiff] CRLC: "[T]he amount of money an organization must accept or spend—\$200—is not substantial and would, as a matter of common sense, operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets." The court added that, under [section] 2(12)(a), "an entity that spends \$200,000 on various non-political activities and donates \$200 (1/10 of 1% of its budget) to a candidate is deemed a political committee."¹⁹²

But perplexingly, even though the Tenth Circuit found the two hundred dollar threshold an unsatisfying criterion, it did not find the Colorado PAC definition to be facially invalid across the board, choosing instead to only rule it unconstitutional as applied to the plaintiff.¹⁹³

The Tenth Circuit came to a similar conclusion in a 2010 case arising out of New Mexico.¹⁹⁴ In this case, the court held that the New Mexico statute's definition of a political committee, which included any organization that spent over five hundred dollars in one year on a political ad campaign, was unconstitutional as applied to the plaintiffs

189. *Id.*

190. WRITING REFORM, *supra* note 33, at IV-1-2.

191. *Colo. Right to Life Comm.*, 498 F.3d at 1139.

192. *Id.* at 1154 (internal citations omitted).

193. *Id.* at 1156 ("However, without more, we cannot say that in every application § 2(12) will be unconstitutional and we decline to formulate a rule of constitutional law broader than is required. Therefore, we decline to reach CRLC's facial invalidity challenge.") (internal citation omitted).

194. *See* N.M. Youth Organized v. Herrera, 611 F.3d 669, 678 (10th Cir. 2010) ("Regulation as a political committee is only proper if an organization primarily engages in election-related speech because an alternate rule would threaten the regulation of too much ordinary political speech to be constitutional.") (quoting N.C. Right to Life, Inc. v. Leake (*NCRTL III*), 525 F.3d 286 (4th Cir. 2008)).

(two multi-purpose groups). The court concluded that the New Mexico statute completely subverted *Buckley*'s major purpose test by classifying an electioneering expenditure greater than five hundred dollars as irrefutably constituting the organization's primary purpose, regardless of what percentage of operating funds the expenditure constituted or what else the organization spent its resources on.¹⁹⁵

The fact that the expenditures at issue in the case were quite small compared to the groups' overall budgets persuaded the Tenth Circuit that the groups could not be appropriately categorized as PACs. As the court noted, the plaintiffs spent the equivalent of 7 percent and 0.5 percent, respectively, of their budgets on the mailings in question. Therefore, "[s]uch proportionally small expenditures, standing alone, cannot justify characterizing an organization's 'major purpose' as electioneering."¹⁹⁶ Finally, the Tenth Circuit held that although the state can require disclosure of campaign related contributions and expenditures, it cannot require disclosure of every organizational contribution and expenditure if the organization's major purpose is not the nomination or election of a candidate.¹⁹⁷

C. *The Ninth Circuit Allows Regulations of Organizations with "A" Major Purpose*

In a 2010 case named *Human Life of Washington Inc. v. Brumsickle*, the Ninth Circuit explicitly rejected its sister Circuits' narrow construction of what counts as a state political committee.¹⁹⁸ While groups with "the major purpose of political advocacy" are obviously "sufficient" to qualify as political committees, the Ninth Circuit explained, this does not mean an "entity must have that major purpose to be deemed constitutionally a political committee."¹⁹⁹ According to the Ninth Circuit, the operative part of *Buckley*'s major purpose test is "the word 'major,' not the article before it."²⁰⁰ Under the court's interpretation, any group with a major purpose of political advocacy that is not "engaged purely in issue discussion" may be regulated as a political committee.²⁰¹

195. *Id.* at 679.

196. *Id.*

197. *Id.*; see also *Colo. Right to Life Comm. v. Davidson*, 395 F. Supp. 2d 1001, 1019–21 (D. Colo. 2005), *aff'd* 91 F.3d 1137 (10th Cir. 2007) (limiting PACs to groups whose major purpose was to engage in express advocacy).

198. *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1010–11 (9th Cir. 2010).

199. *Id.* at 1011.

200. *Id.* (quoting *NCRTL III*, 525 F.3d at 328 (Michael, J., dissenting)).

201. *Id.* at 1010.

The Ninth Circuit's decision in *Brumsickle* runs directly contrary to the Fourth Circuit's holding in *NCRTL III*. The Ninth Circuit declared that the result of *NCRTL III* was unreasonable, based on the "fundamental organizational reality that most organizations do not have just one major purpose."²⁰² As the Ninth Circuit remarked, under the Fourth Circuit's definition, an organization could easily circumvent regulation as a political committee by "merging with [an] affiliated organization, and thus diluting the newly created organization's relative share of advocacy activity."²⁰³ For these reasons, the court upheld a broadly worded Washington State law requiring disclosure from any organization "one of [whose] primary purposes [is] to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions."²⁰⁴

The Ninth Circuit's *Brumsickle* decision discussed the major purpose test at length because the plaintiff had urged the court to adopt a 50% bright-line rule:²⁰⁵ "We disagree with [Plaintiff] Human Life's reading of *Buckley*, and we reject its invitation to adopt a bright-line rule prohibiting all regulation of groups with 'a' primary purpose of political advocacy."²⁰⁶ After deciding that regulating an "a" major purpose entity instead of a "the" major purpose entity was constitutionally permissible, the Ninth Circuit then considered the tailoring of the Washington State disclosure statute at issue and found that the law was justified by the state's information interest.²⁰⁷

The court then dug into the percentages, as is typical in a major purpose case. The Ninth Circuit also rejected a mechanical 50% rule:

Consider, for instance, two otherwise identical groups: One spends 40% of its time and resources on political advocacy, 30% of its time and resources producing merchandise, and 30% of its time and resources overseeing academic research. The other group spends 45% of its time and resources on political advocacy, 45% of its time and resources producing merchandise, and 10% of its time and resources overseeing academic research. Political advocacy is "the" major purpose for the former group (because political advocacy commands the largest share of the group's time and resources), but it is just "a" major purpose of the latter (because the group expends

202. *Id.* at 1010–11 (quoting *NCRTL III*, 525 F.3d at 330 (Michael, J., dissenting)).

203. *Id.* at 1013.

204. *Id.*

205. *Id.* at 1009–11.

206. *Id.* at 1009–10 (internal citation omitted).

207. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (campaign finance disclosure "provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office").

equal time and resources on political advocacy and merchandise production). Under Human Life's interpretation of *Buckley*, the government may constitutionally regulate the former group and not the latter, even though in absolute terms the latter group spends more time and resources than the former on political advocacy.²⁰⁸

Thus, in the Ninth Circuit, a bright-line 50% threshold rule would be suspect because it would fall differently on very similarly situated, politically active groups.

The court noted that allowing states to regulate only entities with "the" major purpose of influencing elections would invite multiple purpose groups to circumvent the campaign finance system.²⁰⁹ The Ninth Circuit thus parted ways with the Fourth Circuit's more narrow reading of *Buckley*'s major purpose test in *NCRTL III*.²¹⁰ In so doing, the Ninth Circuit has given regulators in the states within its jurisdiction considerably more leeway to regulate politically active multi-purpose groups.

IV.

HAS ANY STATE REGULATED THE DGA OR RGA AS A PAC?

A. *North Carolina's Attempt to Regulate the RGA as a PAC*

The issue of whether states can regulate the Governors Associations is not merely an academic question. States have in recent years tried to regulate the RGA. North Carolina was the first to try. The fact that North Carolina would tangle with the RGA is not surprising given its rigorous approach to campaign finance. The North Carolina litigation over this issue took place in state and federal courts over a span of several years, but in the end, the RGA successfully argued that it should not be treated as a PAC under North Carolina law, even though in 2004 it spent over \$190,000 on a media campaign in support of a Republican candidate for governor of North Carolina.²¹¹

208. *Human Life of Washington Inc.*, 624 F.3d at 1011.

209. *Id.* at 1012.

210. The Ninth Circuit's conclusions in *Brumsickle* are akin to a Colorado state court's holding on to the "a" versus "the" major purpose distinction. *Independence Inst. v. Coffman*, 209 P.3d 1130, 1139 (Colo. App. 2008), *cert. denied*, 130 S. Ct. 625 (2009) ("[W]e agree, that the phrase 'a major purpose,' is not inherently vague. We perceive no basis to conclude that this phrase is invalid in all respects or that it cannot be constitutionally applied to any multi-issue committee.").

211. *Koerber v. Leake*, 2007 WL 2177885, at *1 (E.D.N.C. July 30, 2007) (not reported); *Republican Governors Ass'n v. N.C. Bd. of Elections*, No. 04 BOE 2051, slip op. at 5 (N.C. Office of Admin. Hearings June 30, 2005), available at <http://www.ncoah.com/hearings/decisions/boe/boe2005.html>.

Initially, the State succeeded in arguing to the Board of Elections that the RGA had broken North Carolina's laws by purchasing broadcast advertisements in support of a candidate for governor without registering as a PAC under state law.²¹² The operative North Carolina law at the time raised a rebuttable presumption that a group was a PAC if it spent \$3,000 or more on a contribution or expenditure within an election cycle.²¹³ Furthermore, North Carolina law at the time banned corporations from spending in state elections unless the money came through a PAC.²¹⁴ It was a misdemeanor to operate a PAC without registering with the state.²¹⁵ The North Carolina Board of Elections ordered a fine imposed for this violation of law equal to the cost of the media campaign, and then sent cease and desist letters to local broadcasters directing them not to air the RGA's ads.²¹⁶ The RGA then sued the state, claiming that the law they had allegedly broken was unconstitutional and that the fine levied by the Board of Elections as well as the cease and desist letters had chilled their political speech in violation of their First and Fourteenth Amendment rights.²¹⁷

In 2005, an administrative law judge in North Carolina reviewing the actions of the Board of Elections ruled in favor of the RGA, finding that it was not a PAC under North Carolina law, in part, because it did not satisfy the constitutionally required major purpose test.²¹⁸ The fact that such a small portion of the group's four-year budget was spent buying the ads in question in support of a candidate for the governor of North Carolina was a decisive factor for the court.²¹⁹

The North Carolina administrative law judge concluded that even though the RGA spent considerably more than \$3,000, "the RGA has rebutted any 'major purpose' presumption because the \$196,260.42 giving rise to the presumption constituted less than 0.48% of the RGA's activities during the four-year 'election cycle' Interpreting this minute percentage to be a 'major' part of the RGA's 'election cycle' activities was erroneous."²²⁰ Consequently, the administrative

212. *Koerber*, WL 2177885, at *1.

213. N.C. Gen. Stat. § 163-278.6(14)(d) (2004).

214. N.C. Gen. Stat. § 163-278.15(a) (2004). Six years later, the federal corporate expenditure ban which parallels this North Carolina ban was held unconstitutional. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

215. N.C. Gen. Stat. § 163-278.13(f) (2004).

216. *Koerber*, WL 2177885, at *1.

217. *Id.*

218. *Republican Governors Ass'n v. N.C. Bd. of Elections*, No. 04 BOE 2051, slip op. at 12 (N.C. Office of Admin. Hearings June 30, 2005), available at <http://www.ncoah.com/hearings/decisions/boe/boe2005.html>.

219. *Id.*

220. *Id.*

law judge held that the RGA's political committee determination by the Board of Elections was erroneous as a matter of state law.²²¹ The state opted not to appeal this ruling.²²² Subsequently in 2007, the state lost a parallel case in federal district court, which barred North Carolina from regulating the RGA as a PAC for its spending in the 2004 election.²²³

Arguably, the administrative law judge used the wrong denominator by comparing the RGA's four-year national budget to the \$196,260.42 spent in the state; this comparison enlarges the denominator by taking into consideration the spending in the other 49 states, which is irrelevant to the issue before the administrative law judge. Moreover, using a four-year budget instead of the primary election period as the time metric further stacked the deck against a major purpose finding for the RGA.

B. Vermont's Nascent Success Regulating the RGA as a PAC

During the time that this article was being written, a second state, Vermont, has tried to regulate the RGA as a PAC. In a lower state court decision, Vermont prevailed.²²⁴

Like North Carolina, Vermont is often on the cutting edge of campaign finance issues. In 1997, then-Governor Howard Dean said in his inaugural address to the state's legislature that "money does buy access, and we're kidding ourselves and Vermonters if we deny it."²²⁵ Shortly thereafter, Vermont adopted a campaign finance law with expenditure limits in an attempt to re-litigate and overturn the central holding of *Buckley v. Valeo*—that expenditure limits were unconstitutional. This strategy ultimately proved futile and *Buckley* remains intact.²²⁶

In Vermont's case against the RGA, the central issue was the application of Vermont's PAC contribution limits (not corporate/union source restrictions as Vermont had no such restrictions).²²⁷ As demon-

221. *Id.*

222. *Koerber*, WL 2177885, at *1.

223. *Id.* at 2.

224. *See Vermont v. Republican Governors Ass'n*, No. 759-10-2010 WNCV, slip op. at 11 (Vt. Super. Ct. Oct. 3, 2011).

225. Bonnie Tenneriello, *Vermont: The State to Watch*, TOMPAINE (Nov. 11, 2000), <http://www.tompaine.com/features/2000/01/31/index.html> (referring to Howard Dean's 1997 inaugural address to the Vermont General Assembly).

226. *See generally* Landell v. Sorrell, 548 U.S. 230 (2006) (rejecting a lawsuit arising out of Vermont seeking to establish the constitutionality of mandatory spending limits).

227. *Vermont*, No. 759-10-2010 WNCV, slip op. at 3.

strated above, the RGA accepts unlimited contributions, the largest of which was \$2 million.²²⁸ Meanwhile, Vermont has a \$2,000 per donor contribution limit on money donated to Vermont PACs.²²⁹ The RGA and its Green Mountain Prosperity PAC spent \$911,422 in the 2009–2010 election cycle in Vermont.²³⁰ At issue in the case was the expenditure of approximately \$50,000 directly by the RGA for political advertisements in Vermont.²³¹ In Vermont, a PAC is defined as any group “which receives contributions of more than \$500 and makes expenditures of more than \$500 for the purpose of supporting or opposing one or more candidates, [or] influencing an election”²³²

Thus, the question before the court was whether Vermont could regulate the RGA as a PAC for its \$50,000 in political advertisements in the state. The court concluded that it could. Finding in favor of the state, the judge wrote, “The [c]ourt rejects the RGA’s argument that as a national organization with multiple purposes, it is essentially too large and complex to be subject to regulation at the state level.”²³³ The court also concluded that the RGA could have more than one primary purpose, holding that “the court will follow the *Brumsickle* decision in finding no constitutional barrier to the regulation of PAC with several purposes—one of which is to influence elections at the states level.” The court concluded that the RGA had violated the \$2,000 contribution limits applicable to Vermont PACs, stating that “[i]t is quite easy to conclude that as written [section] 2805 prohibits the RGA from accepting contributions in excess of \$2,000 if it spends more than \$500 to affect a Vermont statewide election. This result is unlikely to come as a complete surprise to the RGA”²³⁴ Given the legal contest over the regulation of groups like the RGA as PACs, this lower court decision in Vermont will most likely be appealed.

But if the findings of the lower court hold up on appeal, the Vermont result could presage a more flexible reading of *Buckley*’s major purpose test—one that honors the domestic law of each state to choose what money can come into a state election and in what magnitude.²³⁵

228. See *infra* Table 7 (\$2 million donation from Mr. Perry).

229. VT. STAT. ANN. 17 § 2805 (West 2011).

230. See *id.* at 2.

231. See *id.*

232. VT. STAT. ANN. 17 § 2801(4) (West 2011).

233. Vermont v. Republican Governors Ass’n, No. 759-10-2010 WNCV, slip op. at 8 (Vt. Super. Ct. Oct. 3, 2011).

234. *Id.* at 6.

235. Western Tradition P’ship, Inc. v. Attorney Gen., No. DA 11-0081, slip op. at 14–15 (describing the corruption caused by out of state corporate spending in Montana as a reason for upholding Montana corporate expenditure ban).

The case is also interesting in that it does not turn on a corporate/union source restriction. If this decision holds up, it could show a new path forward for states trying to keep big multistate organizations out of their elections—all states would have to do is place reasonable contribution limits on state PACs. If several states took this approach, the Governors Associations would likely split into two groups: (1) an unlimited Super PAC-like group that could only spend in states without campaign finance regulations, and (2) a separate group that is funded by small donors to spend in states that have more strict hard money limits.

CONCLUSION

As explained above, state corporate contribution bans may not be worth the paper they are printed on if corporate-funded 527s like the Governors Associations are able to sidestep the bans and give directly to candidate committees and state political parties. In the period that I examined (2002–2010), 642 publicly traded companies gave money to the Governors Associations.²³⁶ Many of these companies were repeat donors that contributed escalating amounts year after year.²³⁷

So far, only North Carolina and Vermont have tried to regulate the RGA as a PAC.²³⁸ After battling for several years, North Carolina was thwarted by judges in both state and federal courts who found that the size of the RGA's expenditure (exceeding \$190,000) was not relevant to the inquiry. What mattered to these courts was the relative size of the in-state expenditures compared to the overall four-year budget of the RGA across all states. By this measure, almost any state expenditure the RGA (or the DGA, for that matter) undertakes will seem miniscule in comparison to its overall budget, which has expanded by millions of dollars over the past decade. One year after North Carolina lost this particular battle with the RGA, the Fourth Circuit noted that entities which self-identify as electoral may be regulated as PACs. States therefore still retain some power to step in and regulate self-identifying multi-purpose entities.

The inability of most states to regulate the Governors Associations takes on added absurdity when the relative magnitude of these

236. The data is compiled and provided by the organization OpenSecrets, a project of the Center for Responsive Politics, through its OpenData Initiative. *OpenData Initiative*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/resources/create/data.php> (last visited Mar. 4, 2012). The coded data is available at <http://www.law.stetson.edu/faculty/torres-spelliscy-ciara/media/Final%20ORGA%20DGA%20Donor%20List%202002-2010.pdf>.

237. *Id.*

238. Again, Vermont recently prevailed in a similar litigation.

spenders in state elections is considered. In the most recent 2010 gubernatorial election cycle, the RGA or DGA were the biggest spenders in four states, and in ten states they were one of the top two spenders. This gives these groups an outsized voice in state elections—often using out-of-state corporate funds. It bears repeating that the use of corporate funds for contributions to candidates and/or state party committees is illegal in twenty-one states. The approach of the Fourth and Tenth Circuits would excuse almost all politically active multi-purpose groups from regulation as state PACs because they would not meet the test of having “the” major purpose of influencing a particular state’s elections. The Ninth Circuit is on the right path in applying the “a” major purpose test to capture multi-purpose groups that spend vast sums of money and resources on elections within a given state. This evolution of the jurisprudence may explain why Vermont won its recent case against the RGA.

Like all prognostication, predicting what will happen if the Supreme Court ever addresses the circuit split is perilous. The outcome will depend on the facts in the case that goes up, as well as who is sitting on the bench. We do not know how this story will end. But realistically, in light of its prior rulings on the constitutionality of other campaign finance questions, if the major purpose question is heard by the Roberts Supreme Court, given the choice between the Fourth Circuit’s approach and the Ninth Circuit’s approach, it will most likely choose the Fourth Circuit’s, excusing regulation of groups like the Governors Associations.²³⁹ Such a Supreme Court ruling is likely not because the Fourth Circuit has the better argument, but rather because of the majority’s demonstrated hostility to reasonable campaign finance reforms.²⁴⁰ A narrow reading of *Buckley*’s major purpose test by the highest court would leave states, even states that have democratically chosen to keep corporate money out of their elections, utterly exposed to this type of spending in all future elections.

239. The Roberts Court has been hostile to campaign finance reform. *See* *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, No. 10-238, slip op. (U.S. June 27, 2011), *available at* <http://www.supremecourt.gov/opinions/10pdf/10-238.pdf> (invalidating triggered matching funds in Arizona’s public financing program); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (invalidating federal corporate political expenditure bans); *Davis v. FEC*, 128 S. Ct. 2759 (2008) (invalidating the Millionaires Amendment); *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007) (*WRTL II*) (invalidating the source restriction for ads which were not the functional equivalent of express advocacy); *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking Vermont’s expenditure and contribution limits).

240. Monica Youn, *The Roberts Court’s Free Speech Double Standard*, AM. CONSTITUTION SOC’Y BLOG (Nov. 29, 2011), <http://www.acslaw.org/acsblog/the-roberts-court%E2%80%99s-free-speech-double-standard>.

Americans were not keen on the concept of banks that were too big to fail. They should also be wary of political spenders that are too big to regulate.

APPENDIX

TABLE 5: REPUBLICAN AND DEMOCRATIC GOVERNORS
ASSOCIATIONS' IMPACT ON THE 2010
GUBERNATORIAL ELECTIONS

State	Contributor Rank	Money Spent	State PAC Source Restriction	Gubernatorial Winner
Arkansas ²⁴¹	DGA was the #2 contributor	\$500,000	Unlimited	Democrat
Arizona ²⁴²	RGA PAC ²⁴³ was #7 contributor	\$575,000	Corporate Money Prohibited	Republican
Florida ²⁴⁴	RGA was #6 contributor	\$8,300,000	Unlimited	Republican
Georgia ²⁴⁵	DGA was #1 contributor	\$2,020,000	Unlimited	Republican
	RGA was the #2 contributor	\$1,125,102		
Idaho ²⁴⁶	RGA was #1 contributor	\$476,763	Unlimited	Republican
Illinois ²⁴⁷	RGA was the #2 contributor	\$7,897,829	Unlimited	Democrat
	DGA was the #13 contributor	\$1,823,682	Unlimited	

241. *Arkansas 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=AR (last visited Mar. 4, 2012).

242. *Arizona 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=AZ (last visited Mar. 4, 2012).

243. It appears the RGA PAC was funded nearly entirely by the RGA. *See, e.g.*, ARIZ. SEC'Y OF STATE, RGA ARIZONA 2010 PAC: 2010 JUNE 30TH REPORT (2011), available at <http://www.azsos.gov/cfs/PublicReports/2010/8C0AD3D8-9922-4C00-9BD2-B3F94B8F99ED.pdf> (showing a donation of \$1.2 million from the RGA to the RGA Arizona 2010 PAC).

244. *Florida 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=FL (last visited Mar. 4, 2012).

245. *Georgia 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=GA (last visited Mar. 4, 2012).

246. *Idaho 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=ID (last visited Mar. 4, 2012).

247. *Illinois 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=IL (last visited Mar. 4, 2012).

Iowa ²⁴⁸	DGA was #3 contributor	\$1,358,500	Corporate Money Prohibited	Republican
	RGA was #4 contributor	\$1,075,000		
Maine ²⁴⁹	RGA PAC was #11 contributor	\$534,519	Unlimited	Republican
Michigan ²⁵⁰	RGA was #2 contributor	\$5,261,816	Corporate Money Prohibited	Republican
New Hampshire ²⁵¹	DGA was #2 contributor	\$394,500	Corporate Money Prohibited	Democrat
New Mexico ²⁵²	RGA was #1 contributor	\$1,722,964	Unlimited	Republican
Ohio ²⁵³	DGA was #12 contributor	\$1,026,395	Corporate Money Prohibited; \$10,000 per year from Unions	Republican
Oregon ²⁵⁴	RGA was #2 contributor	\$2,528,135	Unlimited	Democrat
	DGA was #8 contributor	\$1,185,087		
Pennsylvania ²⁵⁵	RGA was #1 contributor	\$7,900,967	Corporate Money Prohibited	Republican
	DGA was #9 contributor	\$1,928,500		

248. *Iowa 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=IA (last visited Mar. 4, 2012).

249. *Maine 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=ME (last visited Mar. 4, 2012).

250. *Michigan 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=MI (last visited Mar. 4, 2012).

251. N.H. REV. STAT. ANN. § 664:4 (2012) (barring contributions from corporations and labor unions). The provision barring corporate contributions was repealed in 2011 after being found unconstitutional in 1999. *Kennedy v. Gardner*, 1999 WL 814273 (D.N.H. 1999) (unreported case)).

252. *New Mexico 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=NM (last visited Mar. 4, 2012).

253. *Ohio 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=OH (last visited Mar. 4, 2012).

254. *Oregon 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=OR (last visited Mar. 4, 2012).

255. *Pennsylvania 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=PA (last visited Mar. 4, 2012).

South Carolina ²⁵⁶	DGA was #4 contributor	\$535,000	\$3,500 per year from Corporations	Republican
South Dakota ²⁵⁷	RGA was #15 contributor	\$51,457	Corporate Money Prohibited	Republican
	DGA was #17 contributor	\$50,000		
Tennessee ²⁵⁸	RGA was #2 contributor	\$1,254,000	Corporate Money Prohibited	Republican
Texas ²⁵⁹	RGA PAC ²⁶⁰ was #5 contributor	\$3,000,000	Corporate Money Prohibited	Republican
	DGA was #10 contributor	\$2,029,788		

256. *South Carolina 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=SC (last visited Mar. 4, 2012).

257. *South Dakota 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=SD (last visited Mar. 4, 2012).

258. *Tennessee 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=TN (last visited Mar. 4, 2012).

259. *Texas 2010*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?y=2010&s=TX (last visited Mar. 4, 2012).

260. This PAC contribution appears to be from Michigan. *See* Letter from the Republican Governors Association to the Texas Ethics Commission (Oct. 25, 2010), <http://204.65.203.5/public/docs/FEC1242.pdf> (listing a \$3,000,000 donation from the RGA Michigan 2010 PAC to Texans for Rick Perry and certifying that no corporate or union money funded the PAC).

TABLE 6: GOVERNORS ASSOCIATIONS' IMPACT ON THE 2008
GUBERNATORIAL ELECTIONS

State	Contributor Rank	Money Spent	State PAC Source Restriction	Gubernatorial Winner
Delaware ²⁶¹	DGA was #2 contributor	\$163,917	Unlimited	Democrat
Indiana ²⁶²	RGA was #5 contributor	\$1,710,000	\$22,000 per PAC per calendar year	Republican
Missouri ²⁶³	RGA was #3 contributor	\$2,645,595	Unlimited	Democrat
	DGA was #4 contributor	\$2,374,250		
Montana ²⁶⁴	DGA was #1 contributor	\$1,445,000	Unlimited	Democrat
New Hampshire ²⁶⁵	DGA was #3 contributor	\$150,650	Corporate Money Prohibited	Democrat
North Dakota ²⁶⁶	RGA was #3 contributor	\$250,000	Corporate Money Prohibited	Republican
Washington ²⁶⁷	DGA was #6 contributor	\$914,000	Unlimited	Democrat
	RGA was #12 contributor	\$470,000		

261. *Delaware 2008*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=DE&y=2008 (last visited Mar. 4, 2012).

262. *Indiana 2008*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=IN&y=2008 (last visited Mar. 4, 2012).

263. *Missouri 2008*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=MO&y=2008 (last visited Mar. 4, 2012).

264. *Montana 2008*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=MT&y=2008 (last visited Mar. 4, 2012).

265. *New Hampshire 2008*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=NH&y=2008 (last visited Mar. 4, 2012).

266. *North Dakota 2008*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=ND&y=2008 (last visited Mar. 4, 2012).

267. *Washington 2008*, NAT'L INST. ON MONEY IN STATE POL., http://www.followthemoney.org/database/state_overview.phtml?s=WA&y=2008 (last visited Mar. 4, 2012).

TABLE 7: BIGGEST SINGLE DONATIONS TO THE GOVERNORS ASSOCIATIONS, 2002–2010²⁶⁸

Donor Name	Amount Given	Date	Recipient
Bob Perry	\$2,000,000	10/4/2010	Republican Governors Ass'n
Bob Perry	\$2,000,000	7/19/2010	Republican Governors Ass'n
Michigan Chamber of Commerce	\$1,600,000	9/1/2010	Republican Governors Ass'n
Michigan Chamber of Commerce	\$1,480,000	6/30/2010	Republican Governors Ass'n
AFSCME	\$1,250,000	12/31/2009	Democratic Governors Ass'n
AFSCME	\$1,000,000	9/24/2008	Democratic Governors Ass'n
Michigan Chamber of Commerce	\$1,000,000	9/20/2010	Republican Governors Ass'n
Bob Perry	\$1,000,000	8/27/2010	Republican Governors Ass'n
Bob Perry	\$1,000,000	10/6/2006	Republican Governors Ass'n
Paul Singer	\$1,000,000	9/24/2010	Republican Governors Ass'n
Richard Devos	\$1,000,000	10/27/2006	Republican Governors Ass'n
Richard Devos	\$1,000,000	10/21/2010	Republican Governors Ass'n
Contran Corp	\$1,000,000	10/12/2010	Republican Governors Ass'n
Sheldon Adelson	\$1,000,000	9/27/2010	Republican Governors Ass'n
David Koch	\$1,000,000	6/30/2010	Republican Governors Ass'n
William Ulm	\$1,000,000	7/5/2006	Republican Governors Ass'n
Richard Devos	\$1,000,000	8/23/2006	Republican Governors Ass'n
News America Inc	\$1,000,000	6/24/2010	Republican Governors Ass'n
Republican National Committee	\$900,000	9/25/2009	Republican Governors Ass'n
Republican State Leadership Committee	\$750,000	10/4/2010	Republican Governors Ass'n

268. OpenSecrets, a project of the Center for Responsive Politics, through its OpenData Initiative. *OpenData Initiative*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/resources/create/data.php> (last visited Mar. 4, 2012). This data is also accessible through the Center for Responsive Politics, Republican Governors Assn: Donor Search (select the year and then enter the name of the donor), http://www.opensecrets.org/527s/527cmtedetail_donors.php?ein=11365877&cycle=2010 and Center for Responsive Politics, Democratic Governors Assn: Donor Search (select the year and then enter the name of the donor), http://www.opensecrets.org/527s/527cmtedetail_donors.php?ein=521304889&cycle=2010.